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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,

Petitioner,

v.

ARTHUR LAWRENCE ABRAMS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The United States Attorney for the District of New Jersey, on behalf of the United States District Court for the District of New Jersey, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The *en banc* opinion of the Court of Appeals (App. A, *infra,* pp. 1-35a) is not as yet officially reported. The *en banc* opinion and order of the district court (App. D, *infra,* pp. 39-52a) is reported at 385 F. Supp. 1210. The opinion of the New Jersey Supreme Court (App. E, *infra,* pp. 53-61a) is reported at 65 N.J. 372 and at 320 A.2d 471.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1975 and was thereafter modified on July 14, 1975 (App. B & C, *infra,* pp. 36-38a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The jurisdiction of the district court existed pursuant to Rule 7 of the General Rules of that court, which rule was duly enacted pursuant to Article III, Section 1 of the Constitution of the United States, 28 U.S.C. §2071 and Rule 83 F.R.C.P.

Question Presented

Where an attorney has been disciplined by a state court for professional misconduct on the basis of an evidentiary record not developed in that court and a United States District Court thereafter seeks to discipline that attorney on the basis of the identical record:

(a) to what extent, if any, is the district court bound by the state court's determination of the appropriate quantum of discipline to be imposed; and

(b) to what extent, if any, is the district court bound by the state court's analysis of the legal or factual issues involved?

Constitutional Provision, Statute and Rules Involved

Article III, Section 1 of the Constitution of the United States, provides as follows:

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts, as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2071 of Title 28, United States Code, provides as follows:

§ 2071. Rule-making power generally

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 102, 63 Stat. 104.

Rule 83 of the Federal Rules of Civil Procedure provides as follows:

Rule 83. Rules by District Courts

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of the rules and amend-

ments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Rule 7 of the General Rules of the United States District Court for the District of New Jersey, provides as follows:

RULE 7 DISCIPLINE OF ATTORNEYS

(1) The chief judge shall have charge of all matters relating to the discipline of members of the bar.

(2) The court may make an order in a disciplinary proceeding disbarring, suspending or censuring, or taking such other action as justice may require, with respect to a member of the bar of this court:

(a) Who has resigned from the bar of a court of any State, Territory, District, Commonwealth or Possession;

(b) Who has been disbarred, suspended from practice or censured in any State, Territory, District, Commonwealth or Possession;

(c) Who has been convicted of a crime involving moral turpitude in any State, Territory, District, Commonwealth or Possession; or

(d) Who is guilty of conduct unbecoming a member of the Bar of this court. Without limiting the generality of the foregoing, such misconduct shall be deemed to include fraud,

deceit, malpractice, conduct prejudicial to the administration of justice or violation of the Code of Professional Responsibility of the American Bar Association.

GENERAL RULES

(3) Proceedings within subdivisions (a), (b), and (c) of Paragraph 2 may be initiated by an order requiring the respondents to show cause within 30 days after service thereof on him, personally or by mail, why he should not be disciplined. Upon the issuance of such order the chief judge may, for good cause, temporarily suspend the respondent pending the termination of the proceedings. Upon the return of said order, if the respondent fails to appear or, if he appears and does not contest, the court shall take such action as justice may require. If the respondent appears and contests, the chief judge shall prescribe procedures to formulate the issues and to provide for a hearing in a manner similar to that set forth in Paragraph 4 hereof.

(4) Proceedings within subdivision (d) of Paragraph 2 shall be presented to the chief judge, and, if he deems the charges of professional misconduct of sufficient weight, he shall refer them for preliminary investigation and recommendation to a committee of members of the bar of the court designated by him or to the United States Attorney. The recommendation shall be presented to the chief judge.

Thereupon, with the approval of the chief judge, the committee designated or the United States Attorney shall proceed against the defendant by a petition setting forth the charges against him and an

order requiring him to file an answer and show cause within 30 days after service on him, personally or by mail, of the petition and order why he should not be disciplined. Upon respondent's answer to the petition, the chief judge may set the matter for prompt hearing before himself, or a court of one or more judges, or may appoint a master to hear and report his findings and recommendations. After such a hearing or report, or if no answer is made by the respondent, the court shall take such action as justice may require.

(5) The court, with the consent of the respondent, may order a disciplinary hearing to be private and direct the papers to be sealed and impounded.

(6) Whenever it appears that an attorney at law admitted to practice in this court is suspended, disbarred, or disciplined in this court, the clerk shall transmit to the Supreme Court of New Jersey and the United States Court of Appeals for the Third Circuit a certified copy of the order of suspension, disbarment or discipline.

(7) A visiting attorney permitted to argue or try a particular cause in accordance with Rule 4(c) who is found guilty of professional misconduct may be precluded from again appearing at the bar of this court. Upon the entry of an order of preclusion, the clerk shall transmit to the Supreme Court of New Jersey and the United States Court of Appeals for the Third Circuit a certified copy thereof, and of the court's opinion.

Statement

Respondent, a New Jersey attorney,[1] was disbarred until further order of the court by the United States District Court for the District of New Jersey of December 10, 1974 (App. D, pp. 39-50a). The proceeding was initiated by an order issued pursuant to Rule 7 of the General Rules of the court directing respondent to show cause before a three-judge panel why he should not be disciplined.

Prior to the issuance of that order, respondent had been suspended for one year from the practice of law by the New Jersey Supreme Court for having knowingly assisted his client in the making of a $20,000 illegal payment to a public official of Jersey City (App. E, pp. 53-61a). The discipline which had been imposed by the New Jersey Supreme Court was based on that court's assessment of a record which had been developed by the Essex County Ethics Committee.[2]

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[1] Respondent is also a member of the bar of this court.

[2] The State of New Jersey conducts attorney disciplinary proceedings through county ethics committees. The ethics committees are charged by law with conducting preliminary investigations and, where warranted, further formal proceedings. A formal proceeding is commenced by the filing of charges. Thereafter, the attorney is required to file an answer. If necessary, a hearing is held at which testimony and other evidence is received. If unprofessional conduct is found, a presentment containing a summary of the matter and the committee's findings of fact is transmitted to the New Jersey Supreme Court for ultimate disposition. The Supreme Court conducts no further hearings and the ethics committees do not make recommendations as to the nature or quantum of discipline to be imposed. New Jersey Court Rules, R1:-20-1 to 1:20-5. That procedure was followed in this case and there is no claim that the state proceedings were defective in any respect.

That entire record, which consisted of certain testimony given under immunity by respondent and his client before the New Jersey State Commission of Investigation, formal charges filed by the Ethics Committee and respondent's answer thereto, respondent's testimony and that of two character witnesses before the committee, affidavits submitted by respondent and counsel to the committee and the committee's presentment and supplemental report, was before the district court (CA, pp. 412-14a).[3]

Respondent appeared personally with counsel before the three-judge panel on two occasions. On both occasions, the court questioned counsel as to matters appearing in the state record and offered respondent the opportunity to supplement the record in any respect. Respondent, though conceding that the district court was not bound by the decision of the New Jersey Supreme Court as to the sanction which could be imposed, elected not to supplement the record (CA, pp. 375-76a, 378a, 412-14a, 405a). At the conclusion of the proceeding, respondent was advised that the matter would be referred to the entire court for disposition (CA, p. 416a).

Seven members of the court were of the view that, while a suspension, disbarment or censure of an attorney by the New Jersey Supreme Court would ordinarily result in corresponding action in the district court, the district court had an independent obligation to make its own rational analysis and determination of the discipline to be imposed in each case and that the discharge of that obligation in respondent's case required disbarment (App. D, pp. 39-42a). Two members of the court, although agreeing that the court had the power to disbar respondent, dissented from the exercise of that power on the ground that policy considerations dictated that the district court impose a discipline identical to that imposed by the New Jersey Supreme Court unless there existed a grave reason for not doing so (App. D, pp. 43-50a).

[3] That record, minus copies of the exhibits appended to the Presentment of the Ethics Committee, is included in the appendix filed in the court of appeals. The designation "CA" as used in this petition refers to that appendix.

1. To illuminate the disagreement between the district court and the New Jersey Supreme Court and, thus, properly to frame the issues considered by the court of appeals, it is necessary briefly to summarize the facts underlying the finding of professional misconduct (see also App. A, pp. 3-10a; App. D, 39-40a; App. E, pp. 53-59a). In 1967, respondent became aware through Clinton B. Snyder, a local real estate broker, of the impending sale of Jersey City waterfront property. Respondent communicated this information to his client, Ezra Sensibar, president of Construction Aggregates Corporation, a firm which specialized in the construction and operation of port facilities. Thereafter, respondent, Snyder and Sensibar formed the Port Jersey Corporation to bid on the waterfront property. The respective ownership interests in Port Jersey were: Construction Aggregates Corporation 60%, Snyder 20% and respondent 20%. On August 1, 1967, the waterfront property was auctioned and Port Jersey was the successful bidder, having bid $2,040,000 (CA, pp. 33-35a).

The waterfront property was essentially a swamp. In addition, it was isolated from city services, such as water and sewerage, and could not be easily reached due to the lack of access roads. In order to develop the property as a port facility, it was necessary in the judgment of the principals of Port Jersey to secure cooperation from the City of Jersey City in the form of construction

of access roads, laying of water and sewerage lines to the property and the providing of favorable tax treatment (CA, pp. 42-45a, 53-54a, 68-69a). At the time Port Jersey successfully bid on the property, the City of Jersey City had not announced that it was committing itself to furnish any such cooperation (CA, pp. 40a, 114a).

Shortly after the successful bid, Sensibar arranged a meeting with John V. Kenny, who, though he held no office was regarded as the *de facto* political leader in Jersey City. At that meeting Sensibar told Kenny that Port Jersey would need many forms of cooperation from the City of Jersey City in order to make the development of the port facility possible. Kenny agreed to furnish the cooperation requested and told Sensibar that if anybody asked for money, he, Sensibar, should come to him, Kenny, and he would take care of it. After being assured of cooperation, Sensibar asked Kenny whether there were any local people who should be taken into the venture. Kenny responded that he would appreciate Port Jersey's employing Comparetto & Kenny as its architect. Respondent was out of town at the time of the meeting but was subsequently advised by Sensibar and Snyder as to what had transpired (CA, pp. 36-37a).

Port Jersey thereafter decided to retain Comparetto & Kenny as its architects because of Kenny's suggestion and because they were "well regarded, well connected locally". Respondent negotiated the contractual terms and drafted the contract, which was entered into in December 1967 (CA, pp. 39-40a, 114-16a).

In March 1968, respondent and Sensibar met with Mayor Whelan and City Council President Flaherty at a party in New York City and respondent explained to those officials the various forms of cooperation which Port Jersey would require. No commitment was made by

officials. Thereafter, respondent negotiated a contract with the city of Jersey City in which the city agreed to construct the necessary access roads and to lay water and sewerage lines to the property (CA, pp. 41-44a).

Title to the property passed in November 1968. Following the closing of title, the city council adopted various resolutions providing for the access roads and water and sewerage lines. The city council also adopted a resolution authorizing the payment of a 5% brokerage commission to the C. B. Snyder Realty Company, a firm in which Snyder had a one-third interest. No provision had been made for the payment of the commission, which amounted to $102,000, either in the bid specifications, announced when the property was auctioned, or in the closing documents which were executed when title passed (CA, pp. 47a, 139a, 140-141a, 143a).

Upon receipt of the $102,000 in January 1969, Snyder paid respondent half, pursuant to an oral arrangement. Respondent deposited the $51,000 he received in a special account, denominated the Arthur Lawrence Abrams Trust Account. This money was ultimately utilized to make an illegal $20,000 payment to the president of the Jersey City council, Flaherty (CA, pp. 47-51a).

Later that month or in the early part of the following month, respondent attended a luncheon with Snyder and Bernard Kenny in Newark. At that time, Kenny stated that the "organization", which respondent understood to mean the Hudson County Democratic Organization, wanted a percentage of the construction costs of the port facility in cash. Kenny did not threaten but did indicate that, in the absence of payment, Port Jersey would experience difficulties. Respondent did not discuss the matter further (CA, pp. 51-55a).

Respondent then informed Sensibar of what had happened. Sensibar thereafter met with Flaherty to discuss complaints he had received from Port Jersey personnel about a lack of cooperation from the city. Sensibar mentioned his original discussion with John V. Kenny. Flaherty replied that he knew about that discussion and told Sensibar that the organization needed money. He suggested that Port Jersey contribute 3% of the cost of construction. Sensibar refused and the meeting ended (CA, pp. 117-18a).

A couple of weeks later, Sensibar met with John V. Kenny. He told Kenny of Flaherty's demand and reminded him of their earlier discussion. Kenny responded by telling Sensibar that he remembered the discussion and would stand by it but that a campaign contribution would be appreciated because the organization had an expensive campaign. Sensibar did not respond and the meeting ended. Sensibar returned to Chicago "with the intention that we would not make any substantial contribution" (CA, pp. 119-20a).

In early April, respondent, Snyder and Bernard Kenny told Sensibar they were stymied at city hall and suggested to him that he have another meeting with Flaherty. A meeting was held in Flaherty's office on April 19. At that meeting, Flaherty stated that he needed $140,000 to finance the balance of the campaign and that he had to go to a few large contributors to get the money. He also stated that the proposal he had made earlier was unrealistic and he was now willing to accept 1% of construction costs as a contribution. Sensibar offered a contribution of $10,000 and, after further discussion, agreed to the making of a $20,000 contribution (CA, pp. 120-23a).

After the meeting, Sensibar consulted with respondent and Snyder who both told him "that it was unrealistic to expect that we could do as much construction work, as much business as we were doing in Hudson County without acceding to a shakedown of some kind. They [respondent and Snyder] thought that $20,000 in the circumstances might be nominal and they urged that I should arrange for us to pay it" (CA, pp. 124a).

Thereafter, respondent issued a $20,000 check on the Arthur Lawrence Abrams Trust Account at Sensibar's request for the purpose of enabling Sensibar to obtain the $20,000 in cash he had agreed to pay to Flaherty (CA, pp. 58-59a, 161-63a). At Sensibar's instruction, respondent falsely represented on the face of the check that it was issued in payment "For Engineering Services". Thereafter, Sensibar sent respondent a false invoice reflecting a $20,000 charge for engineering services (CA, pp. 311-13a). Sensibar cashed the check and delivered the cash to Snyder, who in turn delivered it to Flaherty (CA, p. 125a). Afterwards, Port Jersey received cooperation from the City in regards to sewerage, water, access roads and favorable tax treatment (CA, pp. 125-26a).

2. On the foregoing facts, the district court differed with the New Jersey Supreme Court as to the quantum of discipline to be imposed because it disagreed that the facts presented mitigating circumstances. Both courts had previously disbarred an attorney, Colsey, who had assisted his client in making an extortionate payment to a public official and, in respondent's case, disagreed as to whether there existed a sufficient distinction between the misconduct in the two cases. As the New Jersey Supreme Court viewed the matter:

> In *Colsey* an attorney was disbarred for knowingly participating in a transaction which involved a corrupt payment to satisfy an illegal demand by a public official. However, unlike the situation here, the attorney was not in any sense a co-victim, played a very active part in the corrupt transaction itself and used the fact that he was a member of the bar as part of the mask for the crime by creating the appearance that a professional fee was involved. 63 N.J. at 215, 306 A.2d at 75. We agree with the position of respondent's counsel that Colsey is distinguishable and that disbarment is not called for. (App. E, p. 60a).

In disagreeing, the district court stated:

> We see no basis for distinguishing this case from In re Colsey, 63 N.J. 210 (1973). Professional misconduct, like fraud, takes many forms. Variations in detail are not significant when the underlying character is the same. A lawyer who countenances and assists client misconduct for the payment of an extortionate bribe countenances two offenses: one, the extortion and two, the bribe. His minimum duty in such circumstances is to advise the client against it in the strongest terms, and if the client persists, to disassociate himself from the matter promptly and completely. And, since a communication in the course of legal service sought in aid of the commission of a crime or fraud is not privileged, N.J. Ev. Rule 26 (2) (a), he may be under a further duty to report the matter to proper authorities. (App. D, p. 40a).

As will be discussed in greater detail below, the four judges comprising the majority in the court of appeals

held that the district court was not permitted to disagree but was required to accept the distinctions made by the New Jersey Supreme Court.

In addition to disagreeing that respondent's variation of participation in the making of an illegal payment to a public official was significant for disciplinary purposes, the district court made two observations concerning the record which reflected a somewhat different approach than that taken by the New Jersey Supreme Court.

The first of these related to respondent's 20% ownership interest in the Port Jersey Corporation, a fact which was undisputed from the outset of the state proceedings and which was at all times relied upon by respondent in attempting to justify his participation in the making of the illegal $20,000 payment. The district court was of the view that "[t]he acquisition of an interest in the client's enterprise was obviously a factor that interfered with the exercise of free judgment on behalf of the client." The New Jersey Supreme Court, in distinguishing respondent's case from Colsey's case, referred, as quoted above, to the fact that Colsey "was not in any sense a co-victim", *i.e.*, Colsey had no direct financial interest in his client's enterprise (App. D, p. 40a).

The second observation made by the district court reflecting a different approach was with respect to the $102,000 commission and the subsequent use of respondent's share to make the $20,000 illegal payment. The district court stated:

> Another factor is that Abrams accepted a share of a real estate commission paid by the City of Jersey City on the sale of property on public bid. He deposited that share in his trust account, explaining that he considered it to belong to the

client, but no credible explanation was provided for the making of the payment in the first place. The commission aspect bears all the indications of a device to divert public funds into channels from which they could be repaid secretly to the public officials. Justification for its payment is not satisfactorily shown. (App. D, p. 40a)

In the state proceeding, the commission was considered in two different contexts. In its initial statement of charges, the Ethics Committee had charged that respondent's participation in sharing the commission and in rebating $30,000 to Port Jersey violated a New Jersey statute which had been repealed prior to the commencement of proceedings (CA, pp. 4-5a). That charge, in the view of the Supreme Court, was apparently abandoned because the Ethics Committee made no reference to it in its supplemental report and, therefore, the court concluded that "the sharing of the brokerage commission" was not before it (App. E, pp. 57a, 58a).

The other context in which the commission was considered was its use to provide the funds from which the illegal $20,000 payment was made. The accusation had been made during the questioning of respondent by the State Commission of Investigation and the Ethics Committee that the payment of the commission, which was a discretionary act by the city council of which Flaherty had been president, was part of a premeditated scheme to provide a fund from which illegal payments could be made (CA, pp. 79a, 201-02a, 226a).[4] In addressing itself to respondent's use of his share to create the trust fund

[4] Respondent's counsel in respondent's presence was additionally questioned on this point in the district court proceeding (CA, pp. 401-05a).

from which the illegal $20,000 payment was made, the New Jersey Supreme Court made two observations:

(1) The purposes of surrounding the original creation of the trust fund is nowhere unequivocally acknowledged though the Committee in its presentment concluded that the $51,000 retained in respondent's possession in a trust account that contained only Port Jersey money was used by Port Jersey to make irregular payments which would not be reflected upon the corporate books of Port Jersey. (App. E, p. 58a)

(2) Though the original creation of the trust fund itself by the respondent was suspect, the record does not permit a finding that it was specifically designed for the illegal payment. (App. E, p. 60a)

3. On review, the court of appeals unanimously agreed that the district court's order could not stand but could not agree either as to the reason why it could not stand or as to whether the district court was to be permitted to take any subsequent action in the matter. Four separate opinions were filed (App. A, pp. 1-35a).

The majority, consisting of four judges, reversed stating that the principles guiding its decision were three in number:

(1) To recognize and reinforce an absolute and unfettered power of the district court to admit and to discipline members of its bar independently of and separately from admission and disciplinary procedures of (a) the state courts and (b) this court.

(2) To recognize that the absolute and unfettered power of the district court to admit or reject appli-

cations for admissions will be circumscribed to the extent the district court depends upon the state court system for eligibility requirements. Thus, all other things being equal, if a district court by rule derivatively admits to its bar those admitted to the state bar, the district court may not arbitrarily deny admission to one who is a member in good standing of the state bar.

(3) To recognize that an absolute and unfettered power of the district court to discipline lawyers may be circumscribed to the extent the district court, in imposing its disciplinary sanctions, relies upon a state's legal or factual determinations. Stated otherwise, the district court's action may be circumscribed to the extent it depends in whole or in part on a state's actions, either for the commencement of the disciplinary proceedings or for a stated basis in the determination of the sanction imposed. (App. A, pp. 15-16a)

Applying those principles, the majority concluded that the district court's action did not conform in two respects. First, it concluded that the district court had relied on the state court decision in *Colsey, supra,* for precedential authority, and that, because it did so, it was required to draw the identical distinctions between that case and the present case that were drawn by the New Jersey Supreme Court. As the majority put it:

> Having elected to bottom its own rational analysis on New Jersey law, the controlling case for the district court was *In Re Abrams*—not *In Re Colsey* (App. A, 21a).

Second, it concluded that the observations expressed by the district court with respect both to the commission and to respondent's interest in his client's enterprise were impermissible because they were not consistent with the treatment of those matters by the New Jersey Supreme Court.

As the majority analyzed the issue, the district court's views constituted views on "charges" which either had never been made in the state proceedings (the ownership interest) or which had been abandoned therein (the commission). Reasoning from this premise, the majority proceeded to analyze the district court disciplinary rule and concluded that the district court had violated its rule by not having provided respondent with formal notice of those "charges" prior to imposing discipline (App. A, pp. 22-26a).

One judge who joined in that opinion filed a separate opinion expressing the view that the principles established by this Court in *Selling* v. *Radford*, 243 U.S. 46 and *Theard* v. *United States*, 354 U.S. 278 required the district court in respondent's case to impose the identical discipline imposed by the New Jersey Supreme Court (App. A, pp. 26-29a).

Three judges dissented from the reversal. They agreed with the majority that it was impermissible for the district court to have considered the commission and respondent's ownership interest without having put respondent on notice prior to the commencement of the proceeding that it would do so. Their analysis differed from the majority's in that they relied on due process notice grounds rather than upon an analysis of the district court rule to reach their result. Unlike the majority, however,

they deemed it appropriate to remand the case to allow the district court a further opportunity to reach its judgment regarding the extent of the discipline, based on the "issue" derived from the state proceeding, or else to seek to have additional charges filed in accordance with Rule 7 (App. A, pp. 30-34a).

One judge who joined in that opinion filed a separate opinion in which he expressed the view that he found this case to be "an exceedingly close case as to whether affirmance is required on this record" (App. A, pp. 34-35a).

Reasons for Granting the Writ

This case presents issues of first impression in this Court which are of fundamental importance to the public, the legal profession and the federal courts. At a time when the problems of attorney discipline are receiving more widespread and searching attention by the profession and by the public, it is imperative that this court provide authoritative guidance as to how the federal courts can best deal with those issues.

In concluding *en banc* that it was impermissible for the district court to disagree with a state court determination as to the discipline to be imposed upon an attorney who was clearly proven to have been guilty of serious misconduct, the court of appeals has forged a precedent inconsistent both with prior precedent in this court as to the extent of a federal court's disciplinary powers and with the disciplinary practice followed in this court pursuant to Rule 8. Moreover, by disagreeing not only as to the basis for its unprecedented action but also as to whether the district court may proceed further in this matter, the court of appeals has created great uncertainty

as to the action a federal court should take when a member of its bar has been disciplined by a state court.[5]

1. This court has consistently held that a federal court has the power both to prescribe requirements for admission to practice before that court and to discipline attorneys so admitted and this power has consistently been recognized by the court to be very broad. *Ex parte Burr,* 22 U.S. (9 Wheat.) 529; *Ex parte Secombe,* 60 U.S. (19 How.) 9, 13; *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 378-79; *Ex parte Robinson,* 86 U.S. (19 Wall.) 505, 512; *Theard* v. *United States, supra* at 281; *In re Ruffalo,* 390 U.S. 544, 547.

This court has also consistently held that review of the exercise of this broad power is confined within the exceedingly narrow limits of clear abuse of discretion. *Ex parte Burr, supra* at 529; *Ex parte Secombe, supra* at 15; *Ex parte Wall,* 107 U.S. 265, 272; *Theard* v. *United States, supra* at 281. In the seminal case on the questions of a federal court's power to discipline attorneys and a reviewing court's power to interpose its judgment as to the exercise of that power, Chief Justice Marshall explained that in disciplinary matters:

> [D]iscretion ought to be exercised with great moderation and judgment; but it must be exercised;

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[5] This case should be contrasted with the recent disciplinary action of the Court of Appeals for the District of Columbia circuit. That court suspended former Attorney General Kleindienst for one month after the Supreme Court of Arizona had chosen the lesser discipline of censure and after the District Court for the District of Columbia had concluded that no discipline at all was warranted. *In the Matter of Richard G. Kleindienst,* No. 5-37-75, filed August 11, 1975 (a copy of the as yet unpublished memorandum order is being served on counsel for respondent along with this petition). The charged misconduct in each instance was identical.

> and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.
>
> Some doubts are felt in this court respecting the extent of its authority as to the conduct of the circuit and district courts towards their officers; but without deciding on this question, the court is not inclined to interpose, unless it were in a case where the conduct of the Circuit or District Court was irregular, or was flagrantly improper. *Ex parte Burr, supra* at 529.

This court has never held that a federal court is bound by a state determination as to the discipline to be imposed. Beginning with *Selling* v. *Radford, supra,* this court has been confronted on five occasions with the question of whether either this court or a lower federal court should disbar an attorney who had been disbarred by a state court.[6] *In re Isserman,* 345 U.S. 286; *In re Isserman,* 348 U.S. 1; *Theard* v. *United Sates, supra; In re Ruffalo, supra.*

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[6] That the question has arisen in this form in probably due to the fact that traditionally federal courts have, with few exceptions, tended to rely on the state courts to conduct disciplinary proceedings and to make disciplinary determinations. Once made by a state court, those determinations have been generally accepted without more by a federal court as a basis for imposing the identical discipline in the federal court. See generally Agata, Admissions and Discipline of Attorneys in Federal District Court: A Study and Proposed Rules, 3 Hofstra L.Rev. 249 *et seq.* (Spring 1975).

In *Selling,* it was contended that simply because the state court had disbarred, this court was required to do so. This court's response was it "should recognize the absence of fair private and professional character inherently arising as the result of [the state disbarment] so far as we are at liberty to do so consistently with the duty resting upon us to determine for ourselves the right to continue to be a member of this Bar", 243 U.S. at 50. This court went on to state that it would disbar in such a case:

> unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1, that the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do. *Id.* at 50-51.

In applying that precedent to the disciplinary actions of lower federal courts, this court has twice reversed disbarment orders which were based on state judgments, holding on both occasions that the lower federal court could not, consistently with its independent obligation to determine for itself whether discipline should be imposed, accept the state judgment in the matter. *Theard* v. *United States, supra; In re Ruffalo, supra.*

In the *Isserman* cases, this court successively split four to four and three to three on the question of whether it should disbar an attorney who had been disbarred by a state court following the affirmance by this court of his conviction for contempt committed during a trial (*Sacher* v. *United States,* 343 U.S. 1). The disagreement in both cases centered primarily on the question of whether simple contempt constituted an adequate basis for disbarment.[7]

From the foregoing discussion, it is, therefore, clear that unbroken precedent in this court required the district court to make its own independent determination of the appropriate discipline to be imposed on respondent and required the court of appeals not to interfere with that determination unless it found a clear abuse of discretion.

2. Reported precedent aside, the disciplinary practice of this court in recent years supports the district court's action in this case. This court does not, in imposing discipline on members of its bar, accept the proposition that it is required to impose the identical quantum of discipline which has been imposed by a state court. Attorneys who have been suspended for misconduct by state courts have regularly been disbarred by this court.[8] *See, e.g., In re Disbarment of Osborne,* 420 U.S. 918 (three year suspension—New York); *In re Disbarment of Buttles,*

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[7] In *Sacher* v. *Association of the Bar,* 347 U.S. 288, this court held that simple contempt involving no moral turpitude did not furnish an adequate basis for a lower federal court to disbar an attorney.

[8] The court of appeals was fully aware of this court's disciplinary practices but apparently concluded that those practices were not relevant to a consideration of the issues before it (App. A, p. 11a).

419 U.S. 1101 (two year suspension—New York); *In re Disbarment of Mades,* 414 U.S. 1154 (two year suspension—Massachusetts); *In re Disbarment of Pavsner,* 409 U.S. 1102 (three year suspension—New York).

3. The action of the court of appeals in this case raises substantial questions requiring this court's review because that action severely limits the exercise of independent federal court determination in disciplinary matters in several critical respects.

First, by holding that the district court was bound by state law and was, thus, required to accept the distinctions which the state court had drawn between two cases, the court of appeals has established within its circuit a novel and significant principle which, if followed, would fundamentally alter the role of the federal courts in disciplinary matters.

Until the court of appeals' decision in this case, no court or commentator had ever accepted the proposition that federal courts are bound in any way to state law in exercising their independent disciplinary powers. *See, e.g.,* Cheatham, The Reach of Federal Action Over The Profession of Law, 18 Stan. L. Rev. 1288, 1291 (1966). None of the cases previously decided by this court support that proposition and petitioner respectfully submits that the proposition is totally inconsistent with the concept of independent determination.

Second, by holding that the district court violated its own disciplinary rule, the court of appeals has significantly enlarged the scope of review of disciplinary determinations and, thus, has correspondingly significantly diminished the independence of federal courts within the circuit in disciplinary matters.

If, as this court has repeatedly held, an exercise of disciplinary power by a federal court is reviewable only

within the exceedingly narrow limits of clear abuse of discretion, the question of whether a lower court correctly applied its rule should never arise because the ultimate question for the reviewing court should be whether the discipline imposed was either clearly improper or was imposed in violation of fundamental rights. To the extent, therefore, that the opinion of the court of appeals can be said to furnish precedent for an expanded scope of review in disciplinary matters, it would, if followed, significantly alter the relationship between district courts and reviewing courts in this highly sensitive area.

Because the two novel holdings discussed above constituted the entire basis upon which the court of appeals reversed the district court's disciplinary determination, the necessity for review by this court is clear.

The alternative analysis employed in the concurring and dissenting opinion, in which three judges joined raises an equally substantial question requiring this court's review because that analysis is also, in petitioner's view, inconsistent with prior precedent of this court.

The three judges who dissented from the reversal were in agreement with the majority that it was improper for the district court to treat two matters in the common evidentiary record differently than they had been treated by the New Jersey Supreme Court, but were not in agreement that the basis for this conclusion was either that the district court was required to follow state law or that it had violated its disciplinary rule.[9]

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[9] No view was expressed in this opinion as to the majority's conclusion that the district court was bound by state law. As to the conclusion that the district court violated its rule, however, the view taken was that it was an inappropriate basis for decision because (1) the district court's actions suggested that it believed its rules had been implemented by the procedures followed, (2) the interpretation of local rules is primarily committed to the courts which promulgated them, and (3) the meaning of the rule in the procedural context that developed was uncertain (App. A, p. 32a).

They based their conclusion on the due process ground of lack of adequate notice of the charges upon which discipline was imposed. This court has held in *In re Ruffalo, supra,* that, where a federal court disbars an attorney on the basis of a state record, the federal disbarment suffers from any due process infirmity in the state proceeding. The infirmity found in *Ruffalo* was that an entirely new charge was formally lodged against an attorney after he had both filed his answer to the original charges and had testified and provided other evidence. The new charge ultimately furnished the entire basis for the federal disbarment.

Ruffalo is clearly distinguishable from the case at bar for four reasons. First, no due process infirmity was either claimed or found to have existed in the state proceeding. Second, no new charge was ever filed against respondent. Third, the two matters treated differently by the district court were matters which were not only considered relevant to an original charge by the Ethics Committee, by the New Jersey Supreme Court, and by the district court but were matters as to which respondent had been questioned by the State Commission of Investigation, the Ethics Committee, and the district court (See pp. 15-17, *supra*). Fourth, a reviewing court could hardly conclude that the additional matters considered by the district court constituted the entire or, indeed, any substantial basis for the discipline imposed.

By construing *Ruffalo,* therefore, to require remand in this case, the concurring and dissenting judges have created a precedent which, if followed, would require a federal court either to accept a state court's factual analysis or run the risk of having a reviewing court conclude that its disagreement with that analysis constituted, for due process purposes, the filing of new charges. Such a

result is not consistent with the principle that a federal court must make its own independent determination of the disciplinary action to be taken.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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SEPTEMBER 1975

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1029

IN THE MATTER OF:

ARTHUR LAWRENCE ABRAMS,
An attorney-at-law

Arthur Lawrence Abrams,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

(D.C. Misc. No. 74-53)

Argued May 8, 1975

Before: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, ROSENN, HUNTER and WEIS, *Circuit Judges*.

OPINION OF THE COURT

(Filed—June 30, 1975)

[1a]

Appendix A

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ALDISERT, *Circuit Judge.*

Arthur Lawrence Abrams appeals from an order of the United States District Court for the District of New

Appendix A

Jersey disbarring him from the practice of law in that court. The circumstances giving rise to this litigation relate to Abrams' issuance of a check, drawn on a trust account and ultimately used to satisfy the extortion of Jersey City officials. The Supreme Court of New Jersey ordered his suspension from the practice of law for one year. *In re Abrams,* 65 N.J. 172, 320 A.2d 471 (1974). Acting on the same evidentiary material, and without conducting a separate evidentiary hearing, the district court entered its order.[1] The question presented for review is the propriety of the district court's action.

I.

Although the facts relevant to the charge against Abrams are not in dispute, we will accept the statement of facts presented in the United States Attorney's brief defending the action of the district court:

> The order appealed from had its genesis in an investigation conducted by the New Jersey State Commission of Investigation ("SCI"). In August 1971,

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ORDER

For the reasons stated, it is hereby ordered that the name of Arthur Lawrence Abrams be, and the same hereby is, stricken from the roll of attorneys permitted to practice before this Court, and until the further order of the Court.

In re Abrams, 385 F. Supp. 1210, 1212 (D.N.J. 1974). Although the last clause renders the order susceptible to the interpretation that the court ordered something less than a final disbarment, the parties have treated this case as one of disbarment. Accordingly, we also will treat the order as a disbarment.

appellant, Arthur Lawrence Abrams, and his client Ezra Sensibar refused, on the basis of the Fifth Amendment, to answer certain questions propounded by the SCI. Thereafter, formal immunity was conferred upon them and their subsequent public testimony in October 1971 formed the predicate for the filing of formal charges against Abrams by the Essex County Ethics Committee. At Abrams' specific request, his testimony and that of Sensibar was made part of the record of the ensuing disciplinary proceeding. Although several charges were initially filed against Abrams, only one charge is now relevant. That charge was as follows:

> On April 22, 1969, by check bearing that date drawn on his trust account in the National Newark and Essex Bank, in Newark, respondent did pay to Construction Aggregates Corporation the sum of $20,000 allegedly for engineering services which sum respondent well knew would be used by said corporation, or an officer thereof, for an illegal and improper purpose contrary to and in violation of N.J.S. 2A:93-6 as a bribe to and to satisfy the extortionate demands of certain public officials of the City of Jersey City.

The facts relevant to that charge are set forth below.

In 1967, appellant became aware through Clinton B. Snyder, a Jersey City real estate broker, of the impending sale of Jersey City waterfront property. Appellant communicated this information to Ezra Sensibar, president of Construction Aggregates Corporation, a firm which specialized in the construction and operation of port facilities. Thereafter, appellant, Snyder and Sensibar formed the

E.S.C.A. Corporation (later renamed the Port Jersey Corporation and hereinafter referred to as "Port Jersey") to bid on the Jersey City waterfront property. The respective ownership interests in Port Jersey were: Construction Aggregates Corporation 60%, Snyder 20% and appellant 20%. On August 1, 1967, the waterfront property was auctioned and Port Jersey was the successful bidder, having bid $2,040,000.

The waterfront property was essentially a swamp. In addition, it was isolated from city services, such as water and sewerage, and could not be easily reached due to the lack of access roads. In order to develop the property as a port facility, it was necessary in the judgment of the principals of Port Jersey to secure cooperation from the City of Jersey City in the form of construction of access roads and water and sewerage lines to the property and the providing of favorable tax treatment. At the time Port Jersey successfully bid on the property, the City of Jersey City had not announced that it was committing itself to furnish the various forms of cooperation Abrams and his co-venturers deemed essential.

Shortly after the auction, a meeting was arranged by Sensibar to obtain the necessary cooperation. The meeting was held at the offices of Comparetto and Kenny, a local architectural and engineering firm, and was attended by John V. Kenny [*de facto* political leader of Hudson County], Sensibar and Snyder. At the meeting, Sensibar told John V. Kenny that Port Jersey would need many forms of cooperation from the City of Jersey City in order to make the development of the port facility

possible. Kenny agreed to furnish the cooperation requested and told Sensibar that, if anybody asked him for money, he, Sensibar, should come to him, Kenny, and he would take care of it. After being assured of cooperation, Sensibar asked Kenny whether there were any local people who should be taken into the venture. Kenny responded that he would appreciate Port Jersey's employing Comparetto and Kenny as its architect. Abrams was out of town at the time of the meeting but was subsequently advised by Sensibar and Snyder as to what had transpired at the meeting.

Port Jersey thereafter decided to retain Comparetto and Kenny as its architects because of John V. Kenny's suggestion and because they were "well regarded, well connected locally." Abrams negotiated the contractual terms and drafted the contract, which was entered into in December 1967.

In March of 1968, Abrams and Sensibar met with Mayor Whelan and City Council President Flaherty at a party at the New York Athletic Club and Abrams explained to these officials the various forms of cooperation which Port Jersey would require. No commitment was made at that time to furnish the cooperation requested. Thereafter, Abrams negotiated a contract with the City of Jersey City in which the City agreed to construct the necessary access roads and to lay water and sewerage lines to the property.

Title to the property did not pass until November 21, 1968. During the period intervening between the successful bid and the closing on the property, appellant, in addition to the negotiations described

above had negotiated certain purchases of adjoining properties in order to resolve potential title problems and had also negotiated a $6,000,000 development loan.

Following the closing of title, the city council of Jersey City adopted various resolutions providing for the furnishing of the access roads, water and sewerage lines. In addition, the city council adopted a resolution authorizing the payment of a 5% brokerage commission to the C.B. Snyder Realty Company, a firm in which Snyder had a one-third interest. No provision had been made for the payment of the commission, which amounted to $102,000, either in the bid specifications, announced when the property was auctioned, or in the closing documents which were executed when title passed.

Upon receipt of the $102,000 in January 1969, Snyder paid Abrams half, pursuant to an oral arrangement entered into between them at some earlier date. Abrams deposited the $51,000 he received in a special account, denominated the Arthur Lawrence Abrams Trust Account. This money remained in the trust account for more than two years and was ultimately utilized in part to make a $20,000 payment to the president of the Jersey City council.[2]

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[2] Of this transaction, the state court noted:

> The respondent testified that although the $51,000 was his to do with as he pleased, he considered that he should ethically turn it over to ESCA [Port Jersey]. He did that by placing it in an "Arthur Lawrence Abrams Trust Account" in the National Newark and Essex Bank; at one point he described the $51,000 in the trust account as "an emergency fund."

65 N.J. at 173, 320 A.2d at 472.

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In late January or early February 1969, Abrams attended a luncheon with Snyder and Bernard Kenny at the Downtown Club in Newark. At that time, Kenny stated that the "organization", which appellant took to mean the Hudson County Democratic Organization, wanted a percentage of the construction costs of the port facility in cash. At that time, the estimated cost of construction of the projected port facility was somewhere between fifty and one hundred million dollars. When this demand was made, Abrams didn't think it was necessary to ask Kenny any details nor did Kenny think it was necessary to tell appellant any details. Kenny did not threaten but did indicate that, in the absence of payment, Port Jersey would experience difficulties. Abrams did not argue with Kenny or discuss the matter further with him.

Following the meeting, Abrams telephoned Sensibar in Chicago and was told by Sensibar that he, Sensibar, would take care of it. Thereafter, Sensibar met with Flaherty in New York. He told Flaherty that he was getting complaints about a lack of cooperation and reminded Flaherty of his, Sensibar's, original discussion with John V. Kenny and the promise of cooperation. Flaherty said that he knew about that discussion but that the organization needed money. He suggested to Sensibar that Port Jersey contribute 3% of the cost of construction. Sensibar refused and the meeting ended.

A couple of weeks later, Sensibar arranged a meeting with John V. Kenny. He told Kenny of Flaherty's demand and reminded him of their earlier discussion. Kenny responded by telling Sensibar that he remembered the discussion and would stand by it but that a campaign contribution would be appreciated because the organization had an expensive campaign. Sensibar did not respond and the meeting ended. Sensibar returned to Chicago "with the intention that we would not make any substantial contribution".

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In early April, Abrams, Snyder and Bernard Kenny told Sensibar they were stymied at city hall and suggested that he, Sensibar, have another meeting with Flaherty. A meeting was held in Flaherty's office on April 19 between Sensibar and Flaherty. At that meeting, Flaherty told Sensibar that he, Flaherty, needed $140,000 to finance the balance of the campaign and that he had to go to a few large contributors to get the money. He also told Sensibar that the proposal he, Flaherty, had made before was unrealistic and he was now willing to come down to 1% of construction costs as a contribution. Sensibar offered a contribution of $10,000, and, after discussion, Sensibar and Flaherty agreed to the making of a $20,000 contribution.

After this meeting with Flaherty, Sensibar consulted with Abrams and Snyder, who both told him "that it was unrealistic to expect that we could do as much construction work, as much business as we were doing in Hudson County without acceding to a shakedown of some kind. They [Abrams and Snyder] thought that $20,000 in the circumstances might be nominal and they urged that I should arrange for us to pay it".

Thereafter, Abrams issued a $20,000 check on the Arthur Lawrence Abrams Trust Account at Sensi-

> bar's request for the purpose of enabling Sensibar to obtain the $20,000 in cash he had agreed to pay to Flaherty. At Sensibar's instruction, Abrams falsely represented on the face of the check that it was issued in payment "For Engineering Services". Thereafter, Sensibar sent Abrams a false invoice reflecting a $20,000 charge for engineering services. Sensibar cashed the check and delivered the cash to Snyder, who in turn delivered it to Flaherty. Afterwards, Port Jersey received cooperation from the City in regards to sewerage, water, access roads and favorable tax treatment.

U.S. Attorney's Brief at 4-9 (footnotes and appendix references omitted).

In 1973, the Essex County Ethics Committee charged Abrams with various ethical violations stemming from his activities for Port Jersey. In reviewing those charges, however, the New Jersey Supreme Court concerned itself only with Abrams' "knowing participation in the $20,000 payment to the Jersey City officials." *In re Abrams, supra,* 65 N.J. at 177, 320 A.2d at 474. After detailing the factual circumstances which spawned the allegations of impropriety, the state court stated:

> We are concerned with the respondent, a member of the bar who, apart from his financial interest in the venture, was acting as legal counsel and was bound by the high ethical principles of his profession. Those principles clearly dictated that he play no part whatever in the corrupt $20,000 payment to the public officials of Jersey City. We are entirely satisfied that respondent's participation in the corrupt payment . . . was unethical and calls for some measure of discipline.

> . . . We agree with the position of respondent's counsel that . . . disbarment is not called for. But we disagree that "discipline which exceeds reprimand" would be excessive. . . .
>
> The determination as to the measure of discipline is difficult and, as we have repeatedly pointed out, "each case must rest largely upon its own particular circumstances." . . . We have concluded that the respondent's professional dereliction warrants suspension from the practice of law for a period of one year and until further order; judgment to that effect will be entered.

Ibid. at 178-79, 320 A.2d at 474-75.

II.

Preliminarily we emphasize that which is before us and that which is not. We are not to decide Abrams' right to practice in this court. We are not in the position of the United States Supreme Court reviewing a disciplinary action imposed by a state court or determining one's right to continue to practice in that Court. We are to decide if reversible error was committed when the district court, under the circumstances of this case, barred Abrams from practicing in that court after the state court had imposed only a one-year suspension.

We agree totally with the United States Attorney that the starting point for analysis is the unquestioned principle that the District Court of New Jersey, like all federal courts, has the power both to prescribe requirements for admission to practice before that court and to discipline attorneys who have been admitted to practice before that

court. *Ex parte Robinson,* 86 U.S. (19 Wall.) 505, 512 (1873); *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 378-79 (1866); *Ex parte Secombe,* 60 U.S. (19 How.) 9, 13 (1859); *Rodgers* v. *United States Steel Corp.,* 508 F.2d 152, 163 (3d Cir. 1975); *see* U.S. Const. art. III, §1; 28 U.S.C. §2071; Rule 83, F.R. Civ. P.

From the earliest days of this nation, the power has been recognized as broad. *See In re Ruffalo,* 390 U.S. 544, 547 (1968); *Theard* v. *United States,* 354 U.S. 278, 281 (1957); *Ex parte Secombe, supra,* 60 U.S. at 13; *Ex parte Burr,* 22 U.S. 529 (1824). However, its exercise is not without limits. As Chief Justice Marshall wrote, a balance must be struck:

> On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself.

Ex parte Burr, supra, 22 U.S. at 529-30.

Although a disbarment proceeding is not criminal in nature, it has consequences which remove it from the ordinary run of civil case. *Konigsberg* v. *State Bar,* 353 U.S. 252, 257 (1957); *see Anonymous* v. *Association of the Bar,* — F. 2d —, 17 Crim. L. Rptr. 2083 (2d Cir., Apr. 3, 1975).

"Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland,* 4 Wall. 333, 380; *Spevack* v. *Klein,* 385 U.S. 511, 515." *In re Ruffalo, supra,* 390 U.S. at 550.

In striking the appropriate balance, the district courts must not operate in a vacuum. If the disciplinary proceedings derive from state court action, federal courts are not totally free to ignore the original state proceedings:

> If the accusation rests on disbarment by a state court, such determination of course brings title deeds of high respect. But it is not conclusively binding on the federal courts. The recognition that must be accorded such a state judgment and the extent of the responsibility that remains in the federal judiciary were authoritatively expounded in *Selling* v. *Radford,* 243 U.S. 46. The short of it is that disbarment by federal courts does not automatically flow from disbarment by state courts. Of the conditions that qualify such a state court judgment, the one here relevant is that some "grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do." *Id.,* at 51.

Theard v. *United States, supra,* 354 U.S. at 282.

III.

Our task is one which is "always painful", involving as it does a "proceeding for disbarment of a lawyer."[3]

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[3] *Theard* v. *United States, supra,* 354 U. S. at 279 (Frankfurter, J.).

But it is also more, for the district court's permanent termination of Abrams' right to practice his profession in the New Jersey district court constitutes a substantially more drastic penalty than that first imposed by the state court. Thus, sensitive personal, institutional and societal interests quickly surface and compete with one another.

These separate interests clamor for vindication, and they do so in a jural environment that is fraught with tension and devoid of decisional and precedential guideposts. The United States Attorney suggests that *In re Fleck,* 419 F.2d 1040 (6th Cir. 1969), *cert. denied,* 397 U.S. 1074 (1970), comes close. We disagree and find little guidance from *Fleck.* There the state court suspended the lawyers indefinitely; thereafter the district court disbarred them. We are not at all certain that a substantial difference exists between indefinite suspension and disbarment of a lawyer.[4] Thus, in Roscoe Pound's phrase, the "body of

[4] This is made abundantly clear in *In re Fleck,* 419 F.2d at 1041, in the appendix setting forth the district court's opinion:

> This matter is before the Court pursuant to an order that respondents show cause why they should not be disbarred from the practice of law in this Court. The respondents were indefinitely suspended from the practice of law in Ohio on December 6, 1961. (Cleveland Bar Association v. Fleck et al., 172 Ohio St. 467, 178 N.E.2d 782.) On June 15, 1962 respondents were suspended forthwith from the practice of law in this Court, and pursuant to Rule 1(E) of the Rules of this Court respondents were ordered to show cause why they should not *also be disbarred from practice in this court.* Rule 1(E) provides in part:
>
> "*Disbarment and Discipline.* Any member of the bar of this court may for good cause shown and after an opportunity has been given him to be heard, be dis-

(Footnote continued on following page)

authoritative materials" relevant to our inquiry gives general, but not specific, guidance. There are no "precepts attaching a definite detailed legal consequence to a definite, detailed state of facts"; at best, we have only some "authoritative starting points for legal reasoning."[5]

Supplied only with "authoritative starting points of legal reasoning" distilled from the Supreme Court teachings, we perceive our role in reviewing the district court's action to be extremely limited:

(1) To recognize and reinforce an absolute and unfettered power of the district court to admit and to discipline members of its bar independently of and separately from admission and disciplinary procedures of (a) the state courts and (b) this court.

(2) To recognize that the absolute and unfettered power of the district court to admit or reject applications for admissions will be circumscribed to the extent the district court depends upon the state court system for eligibility requirements. Thus, all other things being equal, if

(Footnote continued from preceding page)

> barred, *suspended from practice for a definite time,* reprimanded, or subjected to such other discipline as the court may deem proper."
>
> (Emphasis supplied)

It appears that the district court rule contemplated suspension "for a definite time." Because the Ohio state court had "indefinitely suspended" the attorneys, the district court ordered them to show cause "why they should not also be disbarred from practice in this court."

[5] Pound, *Hierarchy of Sources and Forms in Different Systems of Law,* 7 TUL. L. REV. 475, 476, 482, 483 (1933).

a district court by rule derivatively admits to its bar those admitted to the state bar, the district court may not arbitrarily deny admission to one who is a member in good standing of the state bar.

(3) To recognize that an absolute and unfettered power of the district court to discipline lawyers may be circumscribed to the extent the district court, in imposing its disciplinary sanctions, relies upon a state's legal or factual determinations. Stated otherwise, the district court's action may be circumscribed to the extent it depends in whole or in part on a state's actions, either for the commencement of the disciplinary proceedings or for a stated basis in the determination of the sanction imposed.

IV.

We now turn to the application of these guidelines to the case at hand.

Initially, we observe the district court's basis for admitting Abrams to its bar: "Abrams is a member of the bar of this Court by derivative admission on motion, by virtue of his status as an attorney licensed to practice by the Supreme Court of New Jersey. Local Rule 4." 385 F. Supp. at 1212. Thus, the district court has sacrificed some of its total independence of the state court system with respect to its admission procedures.[6]

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[6] Rule 4 of the United States District Court for the District of New Jersey provides in part:

> A. The bar of this court shall consist of those persons heretofore admitted to practice in this court and those who may hereafter be admitted in accordance with these rules.

(Footnote continued on following page)

The majority opinion for the divided district court described the disciplinary proceedings under Local Rule 7.[7]

(Footnote continued from preceding page)

> B. Any attorney licensed to practice by the Supreme Court of New Jersey may be admitted as an attorney at law on motion of a member of the bar of this court, made in open court, and upon taking the prescribed oath and signing the roll.
>
> C. Any member in good standing of the bar of any court of the United States or of the highest court of any state, who is not eligible for admission to the bar of this court under subdivision B of this rule, may in the discretion of the court, on motion, be permitted to appear and participate in a particular case; provided, however, that such appearances and participation in civil actions, individually or by a law firm of which said attorney is a member or associate, shall be limited to not more than three actions in any calendar year. . . .

7. Rule 7 of the United States District Court for the District of New Jersey provides, in part:

> (1) The chief judge shall have charge of all matters relating to the discipline of members of the bar.
>
> (2) The court may make an order in a disciplinary proceeding disbarring, suspending or censuring, or taking such other action as justice may require, with respect to a member of the bar of this court:
>
> (a) Who has resigned from the bar of a court of any State, Territory, District, Commonwealth or Possession.
>
> (b) Who has been disbarred, suspended from practice or censured in any State, Territory, District, Commonwealth or Possession;

(Footnote continued on following page)

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(Footnote continued from preceding page)

(c) Who has been convicted of a crime involving moral turpitude in any State, Territory, District, Commonwealth or Possession; or

(d) Who is guilty of conduct unbecoming a member of the bar of this court. Without limiting the generality of the foregoing, such misconduct shall be deemed to include fraud, deceit, malpractice, conduct prejudicial to the administration of justice, or violation of the Canons of Professional Ethics of the American Bar Association.

(3) Proceedings within subdivisions (a), (b), and (c) of Paragraph 2 may be initiated by an order requiring the respondent to show cause within 30 days after service thereof on him, personally or by mail, why he should not be disciplined. Upon the issuance of such order the chief judge may, for good cause, temporarily suspend the respondent pending the termination of the proceedings. Upon the return of said order, if the respondent fails to appear or, if he appears and does not contest, the court shall take such action as justice may require. If the respondent appears and contests, the chief judge shall prescribe procedures to formulate the issues and to provide for a hearing in a manner similar to that set forth in Paragraph 4 hereof.

(4) Proceedings within subdivision (d) of Paragraph 2 shall be presented to the chief judge, and, if he deems the charges of professional misconduct of sufficient weight, he shall refer them for preliminary investigation and recommendation to a committee of members of the bar of the court designated by him or to the United States Attorney. The recommendation shall be presented to the chief judge.

Thereupon, with the approval of the chief judge, the committee designated or the United States Attorney shall proceed against the defendant by a petition setting forth the charges against him and an order requiring him to file an answer and show cause within 30 days after service on

(Footnote continued on following page)

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In its statement of reasons, the district court acknowledged a responsibility to the New Jersey state court system, implicitly incorporating the statement of "facts and circumstances" set forth in the opinion of the New Jersey Supreme Court. *See* 385 F. Supp. at 1211. Thus, the district court found no adjudicative facts on its own; instead it relied exclusively on those found by the state court. The district court then conceded:

> Ordinarily, a suspension, disbarment or censure by the Supreme Court of New Jersey will result in corresponding action here. Local Rule 7. But this accommodation does not necessarily suffice to discharge the independent obligation of this Court to take appropriate action on its own rational analysis and determination, although in doing so it will hold the greatest respect for, and give due weight and consideration to, the views of the Supreme Court. *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); *In re Wilkes*, 494 F.2d 472, at 474-75 (C.A. 5, 1974).

Ibid. at 1212.

(Footnote continued from preceding page)

him, personally or by mail, of the petition and order why he should not be disciplined. Upon respondent's answer to the petition, the chief judge may set the matter for prompt hearing before himself, or a court of one or more judges, or may appoint a master to hear and report his findings and recommendations. After such a hearing or report, or if no answer is made by the respondent, the court shall take such action as justice may require. . . .

Appendix A

A.

We acknowledge the right of the district court "to discharge [an] independent obligation" and to "take appropriate action on its own rational analysis and determination." We further acknowledge that the "appropriate action" may be at variance with that taken by the state court system. We also acknowledge that the district court may draw inferences from "facts and circumstances" which differ from those drawn by the state. Especially do we believe that the district court may emphasize countervailing federal considerations. *Cf., e.g., Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 537 (1958). But "appropriate action" must always embody a proper application of governing legal precepts. We conclude that the district court's action was deficient in this respect.

For "its own rational analysis and determination" the district court relied in part on a New Jersey Supreme Court decision for precedential authority for its action.

> We see no basis for distinguishing this case from In re Colsey, 63 N.J. 210, 306 A.2d (1973). Professional misconduct, like fraud, takes many forms. Variations in detail are not significant when the underlying character is the same. A lawyer who countenances and assists client misconduct for the payment of an extortionate bribe countenances two offenses: one, the extortion and two, the bribe. His minimum duty in such circumstances is to advise the client against it in the strongest terms, and if the client persists, to disassociate himself from the matter promptly and completely. And, since a communication in the course of legal service sought in aid of the commission of a crime or fraud is not

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> privileged, N.J. Ev. Rule 26(2)(a), he may be under a further duty to report the matter to proper authorities.

385 F. Supp. at 1211-12.

In the context of its announced objective to "hold the greatest respect for, and give due weight and consideration to, the views of the [New Jersey] Supreme Court," the district court was not free to rely upon *Colsey* for New Jersey precedential guidance. Having elected to bottom its own rational analysis on New Jersey law, the controlling case for the district court was *In re Abrams*—not *In re Colsey*. And, in *Abrams*, the New Jersey Supreme Court explicitly concluded that *Colsey* was distinguishable:

> In *Colsey* (63 N.J. 210, 306 A.2d 72) an attorney was disbarred for knowingly participating in a transaction which involved a corrupt payment to satisfy an illegal demand by a public official. However, unlike the situation here, the attorney was not in any sense a covictim, played a very active part in the corrupt transaction itself and "used the fact that he was a member of the bar as part of the mask for the crime by creating the appearance that a professional fee was involved." 63 N.J. at 215, 306 A.2d at 75. We agree with the position of respondent's counsel that *Colsey* is distinguishable and that disbarment is not called for.

65 N.J. at 178, 320 A.2d at 475.

Whatever freedom the district court possessed independently to draw inferences from the facts and circumstances, the court could not, with fealty to consistency, disregard the interpretation of New Jersey state law by that state's highest court and at the same time profess

to "hold the greatest respect for, and give due weight and consideration to, the views of the [New Jersey] Supreme Court."

B.

Local Rule 7 provides for disciplinary proceedings of one who has been disbarred or suspended from practice in any state, Rule 7(2)(b), and one who is "guilty of conduct unbecoming a member of the bar of this court", Rule 7(2)(d). The rule to show cause entered against Abrams clearly was limited to Rule 7(2)(d) and 7(2)(b):

> It appearing that Arthur Lawrence Abrams may have been guilty of conduct unbecoming a member of the Bar of this court; and
>
> It further appearing that the said Arthur Lawrence Abrams was suspended from the practice of law by order of the Supreme Court of New Jersey dated June 3, 1974. . . .

The second paragraph of the rule relates to the state proceedings in which the only charge considered was the issuance by Abrams of a check for $20,000. We agree with the United States Attorney's assertion that "[a]lthough several charges were initially filed against Abrams, only one charge [the $20,000 payment from the trust fund] is now relevant." U.S. Attorney's Brief at 4. Unfortunately, the district court did not limit its consideration to that matter. Instead, it also considered the $102,000 real estate commission shared by Abrams:

> Another factor is that Abrams accepted a share of a real estate commission paid by the City of Jersey City on the sale of property on public bid. He deposited that share in his trust account, explaining that he considered it to belong to the client, but no credible explanation was provided for the making of the payment in the first place. The commission aspect bears all the indications of a device to divert public funds into channels from which they could be repaid secretly to the public officials. Justification for its payment is not satisfactorily shown.

385 F. Supp. at 1211. Consideration by the district court of the "commission aspect" was impermissible for two reasons.

First, although the presentment of the county Ethics Committee contained a finding that the sharing of the brokerage commission violated New Jersey law, this charge was later "withdrawn by the Committee", *In re Abrams, supra,* 65 N.J. at 176, 320 A.2d at 473, and not considered by the New Jersey Supreme Court. *Ibid.* at 177, 320 A.2d at 474. Therefore, insofar as the district court disciplinary proceeding derived from New Jersey's suspension of Abrams, *see* Local Rule 7(2)(b), page 21 n.7 *supra,* the district court could not, with propriety, rely on the "commission aspect" of the original presentment.

Second, insofar as the district court disciplinary proceeding derived from "conduct unbecoming a member of the bar" separate and apart from that considered in the New Jersey state court proceedings, the lower court was obliged to follow its own procedural rules. This it failed to do. Local Rule 7(4), page 22 n.7 *supra,* provides that proceedings relating to "conduct unbecoming a member of the bar of this court" "shall be presented to the chief judge, and, if he deems the charges of professional misconduct of sufficient weight, he shall refer them for pre-

liminary investigation and recommendation to a committee of members of the bar of the court designated by him or to the United States Attorney." The reference procedure was not followed; nor were the procedures governing reception of any recommendation of the committee designated or the United States Attorney followed.

It is argued that the failure of the district court to follow the provisions of Local Rule 7(4) can be justified because "[*t*]*hese things* had been done in the state proceeding which [Abrams] states were not 'wanting in due process in any respect'. He specifically asked the District Court to decide the matter on the basis of the *entire state record*. He did not ask for further investigations which might have led to the filing of yet additional charges. He was content to avoid further proceedings then. He cannot be heard to complain now that their lack prejudiced him in any way. He was found on the basis of the record which he declined to supplement to have been guilty of the *precise misconduct originally charged* and that record overwhelmingly supports that charge and amply justifies his disbarment." U.S. Attorney's Brief at 34-35 (our emphasis) (appendix reference omitted).

The deficiency in this argument is that that part of the "precise misconduct originally charged" by the Ethics Committee relating to the $102,000 commission was withdrawn by that committee and not considered by the state court. When Abrams "specifically asked the District Court to decide the matter on the basis of the entire state record", he had the right to assume that the federal court was only going to consider the $20,000 payment. He had the right to assume that in the absence of a Local Rule 7(4) procedure, the only matter relevant in the district court was the charge considered by the state court.

As we have previously observed, the United States Attorney in his brief agrees that "[a]lthough several charges were initially filed against Abrams, only one charge is now relevant." If only one charge is relevant before this court, only one charge should have been relevant before the district court. If the district court chose, as was its right under 7(2)(d), to go beyond the state court proceeding and examine other aspects of Abrams' "conduct unbecoming a member of the bar of this court," it was obliged to follow its own rules. The United States Attorney cannot now, with consistency, argue that Abrams waived[8] his right to Local Rule 7(4) procedures to defend against charges not processed in the state court, and at the same time agree that only one charge is relevant to these proceedings—that concerning the $20,000 payment.

Accordingly, we hold that the district court erred in considering the "commission aspect" of Abrams' conduct.

Finally, the district court considered its "view" that "[t]he acquisition of an interest in the client's enterprise was obviously a factor that interfered with the exercise of free judgment on behalf of the client." 385 F. Supp.

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[8] The United States Attorney also appears to argue that the burden of initiating the independent investigation under Local Rule 7(4) was on Abrams. "[Abrams] did not ask for further investigations which might have led to the filing of yet additional charges. He was content to avoid further proceedings then. He cannot be heard to complain now that their lack prejudiced him in any way." U.S. Attorney's Brief at 35. We disagree. The clear meaning of Local Rule 7(4) is that the Chief Judge initiates the reference procedure and that the procedure is mandatory. "[The *Chief Judge*] *shall* refer [the charges of professional misconduct] for preliminary investigation and recommendation . . . ." *See* page 15 n.*7 supra* (emphasis added).

at 1211. For the same reasons that it was impermissible under these circumstances for the district court to consider the "commission aspect", so also was the district court precluded from relying on this perceived impropriety in assessing a greater sanction than the state court. Indeed, if anything, the case against the district court's considering this aspect of Abrams' activities is even stronger, for it was not the subject of any charge contained in the Ethics Committee presentment.

The district court's judgment of disbarment will be reversed.

ROSENN, *Circuit Judge*, concurring.

I join in the majority opinion. I write to emphasize what I believe should be the proper standard for federal disciplinary action based upon a record compiled in state proceedings.

Each federal court has a broad independent power to discipline members of its bar, initiate and conduct disciplinary proceedings, and impose sanctions predicated upon the record it has compiled. *See Theard* v. *United States,* 354 U.S. 278, 281 (1957). The independence of a district court acting in such fashion circumscribes our authority to review its disciplinary actions. *See Ex Parte Burr,* 22 U.S. (9 Wheat.) 529, 530 (1824). When, however, the disciplinary action is dependent on a record developed in state proceedings, I believe the district court should, absent exceptional circumstances, impose the same sanctions prescribed by the state.

This standard is founded upon the vital principle of comity, which represents a "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971). Comity recognizes that the founding fathers created a system "in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

In the United States, admission to the bar and discipline of attorneys is peculiarly within the province of the states. *See In re Dreier,* 238 F.2d 68 (3d Cir. 1958). This is the practice in this circuit. New Jersey, for example, has a comprehensive and thoughtful system dealing with every aspect of admission to the bar and any subsequent discipline. Admission to the bar of the District Court of New Jersey is derivative, dependent upon admission to the bar of the Supreme Court of New Jersey. Absent misconduct in the district court, disciplinary actions also are derivative in a sense, since they generally are based, as in the instant matter, on the previously compiled state record; they occur after the completion by the state of its proceedings.

The imposition of disbarment by the federal court when the state has imposed only suspension implicitly attacks the regularity and judgmental values of the state proceedings, implying that the sanction chosen by the state courts is inappropriate. This result is bound to create tensions between the state and federal judiciaries.

A second important policy behind the need to avoid disparate sanctions by the federal and state courts is the maintenance of public confidence in our legal system and in the bar. Disbarment is designed to protect the public. *In re Ruffalo,* 390 U.S. 544, 550 (1968). The district

court's action permits Abrams to practice in the state, but not the federal, system. Such an anomaly can only lead to confusion in the minds of the public, which justifiably may speculate why an attorney not qualified to practice in a federal court has sufficient moral character to practice in the state court. Unless an exceptional reason of record justifies such disparate treatment, its effect will, in my opinion, render a grave disservice to the public.

The Supreme Court has recognized the vitality of these interests in *Selling* v. *Radford,* 243 U.S. 46 (1917). The Court declared that it would afford the utmost respect in sanctioning members of its bar to the judgment of state proceedings unless there was a failure of due process, an infirmity of proof or some other "grave reason" not to give effect to the "natural consequences of the judgment. . . ." *Id.* at 51. Forty years later, in *Theard* v. *United States, supra,* the Court, while reaffirming the independence of the federal courts in disciplinary matters, directed a district court imposing sanctions based upon state proceedings to be guided by the standards of *Selling.*

We also have noted the importance of following the judgment of the state courts in these matters. *In re Dreier,* 258 F.2d 68 (3d Cir. 1958). The District Court for the Middle District of Pennsylvania had denied Dreier's application for admission to its bar on the ground that Dreier lacked good moral character due to events for which he had been suspended from the bar of the Luzerne County Court of Common Pleas. Prior to his application for admission to the federal bar, the county bar had restored Dreier to membership in good standing. This court held that the federal district court could not enter an order amounting to permanent disbarment based

upon events for which Dreier had paid the penalty imposed by, and had been restored to membership in good standing of, the bar which knew him best.

Finally, the teachings of *Selling* and *Theard* have not been lost upon the district courts throughout the country. Sixty-nine district courts responded to a survey asking whether they ever had deviated from disciplinary actions taken by the courts of their states. One district court, the Southern District of New York, responded that they had a rule permitting disparate discipline for the reasons announced in *Selling* or if "the misconduct established has been held by this Court to warrant substantially different discipline." Rule 5(d). Only three other district courts cited instances of deviating from the action of their state courts. One such instance was *In re Dreier,* just discussed. In another, the disbarment by the district court was reversed for lack of due process. *In re Jones,* 506 F.2d 527 (8th Cir. 1974). In the third instance, the district court had appointed a special master who had conducted a three-day hearing and received much evidence not heard by the Alaskan Supreme Court. *In re Mackay,* 298 F. Supp. 170 (D. Alaska 1969).

In sum, I believe the district court should have followed the standards of *Selling* and *Theard,* which impliedly were recognized by this court in *Dreier,* and which are acknowledged in practice at least by the overwhelming majority of the district courts throughout the country. There is no contention that the state proceedings lacked due process, and the parties stipulated to the relevant facts. The district court did not adequately explicate, and I do not perceive, any grave reasons for choosing more severe punishment than imposed by the Supreme Court of New Jersey.

Since the majority opinion, as I read it, does not preclude the district court from imposing the sanctions decreed by the state court, I join in the reversal.

Appendix A

ADAMS, *Circuit Judge*, Concurring and Dissenting

Since no particularized supplemental allegations were prepared for the district court, the basis for the charge in that court reasonably appeared to be that Arthur L. Abrams had issued a check for $20,000, to be used to bribe a municipal official. It was on this specific charge that the New Jersey Supreme Court had entered its judgment to suspend Abrams from the practice of law for one year.[1] And this charge necessarily must have been the one that Abrams and his counsel had in mind when they elected to rest on the record that had been before the New Jersey state court.

However, the district court did not confine itself to the bribery charge. Rather, "view[ing] the matter somewhat differently" from the New Jersey Supreme Court, the district court proceeded to consider two additional issues: Abrams' interest in his client's enterprise, and his acceptance of a real estate commission. Concerning these, the district court said:

> The acquisition [by Abrams] of an interest in the client's enterprise was obviously a factor that interfered with the exercise of free judgment on behalf of the client.
>
> Another factor is that Abrams accepted a share of a real estate commission paid by the City of Jersey City on the sale of property on public bid. He deposited that share in his trust account, explaining that he considered it to belong to the client, but no credible explanation was provided for the making of the payment in the first place. The commission

[1] In re Abrams, 65 N.J. 172, 320 A.2d 471 (1974).

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> aspect bears all the indications of a device to divert public funds into channels from which they could be repaid secretly to the public officials. Justification for its payment is not satisfactorily shown.[2]

The state court had taken a substantially diverse attitude toward these two items. As to the propriety of Abrams' association with the business venture of his client, the New Jersey Supreme Court was silent. Respecting the real estate commission, later deposited in the trust fund, the state court, on the same record had acknowledged that:

> Though the original creation of the trust fund itself by the respondent was suspect, the record does not permit a finding that it was specifically designed for the illegal payment.[3]

If the district court determined to go beyond the scope of the charges resolved against Abrams in the state proceeding, namely, the illegal $20,000 payment, and to consider other aspects of Abrams' conduct, it should have so advised Abrams and given him and his counsel the opportunity to introduce evidence relating to such conduct. Due process would seem to require as much.[4] No justification

[2] In re Abrams, 385 F. Supp. 1210, 1211 (D. N.J. 1974) (citation omitted).

[3] 320 A.2d at 475.

[4] The parties have not disputed that a disbarment proceeding must satisfy procedural due process requirements. Thus, the only issue confronting the Court in this regard is the nature of the procedure that must be employed. *Cf.*, Goss v. Lopez, 95 S. Ct. 729 (1975). *See* Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975).

has been forthcoming that would excuse the failure to supply Abrams a full description of the charges to be considered.[5]

In a case presenting a situation similar to the one here, *In re Ruffalo,* the Supreme Court made it clear that in a disbarment case the charge against the attorney must be set forth at the outset. It said: "[disbarment] proceedings [are] of a quasi-criminal nature. The charge must be known before the proceedings commence."[6]

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[5] It is observed that local rule 7(4) for the United States District Court for the District of New Jersey seems to provide for a disciplinary procedure which—at least when it extends beyond the grounds relied upon in a state disciplinary process—calls for notice of the sort that is lacking here. See majority opinion note 7. But apparently the district court which promulgated the rule did not so interpret it, at least in the procedural context that developed here. Rather, the district court's actions suggest that it believed its rules were implemented by the procedures followed in this case.

Because the interpretation of local rules is primarily committed to the district court that promulgates them, and because their meaning in the present context appears somewhat uncertain, I am constrained to reach the question whether constitutional due process has been satisfied.

[6] In re Ruffalo, 390 U.S. 544, 551 (1968) (citation omitted). Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868).

In three cases subsequent to the *Ruffalo* decision, the Supreme Court has reaffirmed that, before proceedings to withdraw a state-controlled benefit are undertaken, a respondent must be given both notice of the reasons urged in support of the contemplated action and an opportunity to respond. Perry v. Sinderman, 408 U.S. 593 (1972) (employment termination); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefit termination).

Nor is it valid to contend that Abrams waived his right to know the charges on which the sanction was to be based, or his right to an opportunity to offer a defense against any and all such charges. There is nothing in the district court record which adequately demonstrates that Abrams was aware that charges respecting his relationship with his client and the $102,000 trust fund were under consideration.[7] Where the duty to apprise Abrams of the full reach of a disciplinary inquiry was not discharged, it would not seem reasonable to conclude that Abrams waived his right to present evidence on the two matters that supported, at least in part, the district court's judgment, independent of the state court conclusion.[8]

I therefore agree with the majority that the judgment of the district court cannot stand. There is no way to determine from the record what disciplinary sanction the district court might have imposed had it confined itself—as its rule[9] seems to indicate and due process requires

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[7] Some intimation of the breadth of the district court inquiry was discussed at the hearing on June 24, 1974. Transcript 6-10.

[8] The Supreme Court has indicated forcefully that even in a civil case involving a sophisticated corporate party, the rudiments of due process—notice of charges and a fair opportunity to be heard—are not lightly presumed waived. In Ohio Bell Tel. Co. v. Public Utility Commission, 301 U.S. 292 (1937), the Supreme Court held, "We do not presume acquiescence in the loss of fundamental rights." *Id.* at 307, *quoted* in D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 186 (1972). The standard for finding waiver in the case at hand, a "quasi-criminal" proceeding, should be no less.

[9] Note 5, *supra.*

—to the charge adjudicated in the state proceeding and the record that the parties specifically stipulated.

However, unlike the majority, I do not believe that an outright reversal is warranted. Rather, I would vacate the judgment that was entered and remand the case. This would allow the district court a further opportunity to reach its judgment regarding the extent of the discipline, based on the issue derived from the state proceeding, or else to seek to have additional charges filed as rule 7 seems to authorize, plus the opportunity afforded Abrams to meet such additional charges.[10]

Chief Judge Seitz and Judge Van Dusen join in this opinion.

VAN DUSEN, *Circuit Judge*, concurring and dissenting:

While joining in the separate opinion of Judge Adams for reversal and remand due to Local Rules 7(2)(d) and 7(4), I find this an exceedingly close case as to whether affirmance is required on this record, as contended in the United States Attorney's brief, and respectfully state these views not stated in Judge Adams' opinion. I emphasize the majority's language that "the starting point

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[10] Whether it is wise or unwise for a federal district court in a situation like the present one to impose disbarment when the highest state court has imposed a temporary suspension is, of course, not before this Court. However, it should be noted that in this regard the Supreme Court has advised the federal courts respecting the considerations that govern a federal disciplinary proceeding that follows a state investigation. Theard v. United States, 354 U.S. 278, 282 (1957); Selling v. Radford, 243 U.S. 46, 51 (1917).

for analysis is the unquestioned principle that the District Court of New Jersey, like all federal courts, has the power both to prescribe requirements for admission to practice before that court and to discipline attorneys who have been admitted to practice before that court" (p. 10) and that its discipline "may be at variance with that taken by the state court system" (p. 16).[1] See *In re Fleck,* 419 F.2d 1040 (6th Cir. 1969).

The district court is entitled to regulate its bar, *inter alia,* in order to assure proper advocacy to assist it in the conduct of its judicial functions. In *Selling* v. *Radford,* 243 U.S. 46, 50 (1917), the Court emphasized "the condition of fair private and professional character, without the possession of which there could be no possible right to continue to be a member of this Bar."

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[1] In the case of *Ex parte Burr,* 22 U.S. (9 Wheat.) 529, 530 (1824), from which the majority quotes at pages 10 and 11 of its opinion, the Court stated at page 530:

> "If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case. Some doubts are felt in this court respecting the extent of its authority as to the conduct of the circuit and district courts towards their officers; but without deciding on this question, the court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper."

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1029

In the Matter of

ARTHUR LAWRENCE ABRAMS,
an Attorney-at-Law,

ARTHUR LAWRENCE ABRAMS,

Appellant

(D.C. Misc. No. 74-53)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, ROSENN, HUNTER and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 12, 1974, be, and the same is hereby reversed. Costs taxed against appellee.

ATTEST:

THOMAS F. QUINN
Clerk

June 30, 1975

APPENDIX C

Amended Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1029

In the Matter of

ARTHUR LAWRENCE ABRAMS
an Attorney-at-Law,

ARTHUR LAWRENCE ABRAMS,

Appellant

(D.C. Misc. No. 74-53)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, ROSENN, HUNTER, and WEIS, *Circuit Judges*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Appendix C

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 12, 1974, be, and the same is hereby reversed. Each party to bear its own costs.

ATTEST:

THOMAS F. QUINN
Clerk

July 14, 1975

APPENDIX D

Opinion and Order of the United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Misc. No. 74-53

In the matter of

ARTHUR LAWRENCE ABRAMS,
an Attorney at Law

OPINION AND ORDER

(Filed—December 10, 1974)

By orders dated June 3 and June 19, 1974, the Supreme Court of New Jersey suspended Abrams from the practice of law for 1 year, effective July 1, 1974, and until the further order of the Court. These disciplinary proceedings on order to show cause under Local Rule 7 followed.

The facts and circumstances are adequately detailed in the opinion of the Supreme Court, 65 N.J. 172 (1974) and need not be repeated here. It was recognized there that Abrams' participation in activities leading to the payment of a bribe to a public official was improper. It was also indicated that his interest in salvaging his investment share of the client's enterprise, to protect which the bribe was paid, and the existence of extortionate ele-

ments in the demands of the public officials, were mitigating factors to be given effect in selecting the degree of disciplinary action to be taken.

We view the matter somewhat differently. The acquisition of an interest in the client's enterprise was obviously a factor that interfered with the exercise of free judgment on behalf of the client. *Code of Professional Responsibility,* Canon 5, EC 5-1, 5-2 and 5-3; DR 5-103 and 5-104.

Another factor is that Abrams accepted a share of a real estate commission paid by the City of Jersey City on the sale of property on public bid. He deposited that share in his trust account, explaining that he considered it to belong to the client, but no credible explanation was provided for the making of the payment in the first place. The commission aspect bears all the indications of a device to divert public funds into channels from which they could be repaid secretly to the public officials. Justification for its payment is not satisfactorily shown.

We see no basis for distinguishing this case from *In re Colsey,* 63 N.J. 210 (1973). Professional misconduct, like fraud, takes many forms. Variations in detail are not significant when the underlying character is the same. A lawyer who countenances and assists client misconduct for the payment of an extortionate bribe countenances two offenses: one, the extortion and two, the bribe. His minimum duty in such circumstances is to advise the client against it in the strongest terms, and if the client persists, to disassociate himself from the matter promptly and completely. And, since a communication in the course of legal service sought in aid of the commission of a crime or fraud is not privileged, N.J. Ev. Rule 26 (2) (a), he may be under a further duty to report the matter to proper authorities.

Abrams is a member of the bar of this Court by derivative admission on motion, by virtue of his status as an attorney licensed to practice by the Supreme Court of New Jersey. *Local Rule* 4. Ordinarily, a suspension, disbarment or censure by the Supreme Court of New Jersey will result in corresponding action here. *Local Rule* 7. But this accommodation does not necessarily suffice to discharge the independent obligation of this Court to take appropriate action on its own rational analysis and determination, although in doing so it will hold the greatest respect for, and give due weight and consideration to the views of the Supreme Court. *In re Ruffalo,* 390 U.S. 544 (1968); *In re Wilkes,* 494 F.2d 472, at 474-5 (C.A. 5, 1974).

Then, too, there will be cases in which this Court will act first. If an attorney be convicted of a crime in this Court, or commits an act of professional misconduct in connection with a matter before this Court, a disciplinary proceeding may begin here and be concluded here, or may take the form of a temporary suspension here pending disciplinary proceedings here or before the Supreme Court. In either case, this Court would duly inform the Supreme Court of the pendency of the matter, and of the outcome, so that it might proceed to carry out its functions under N.J. Const. 1947, Art. 6, §2, par. 3. The same would be true in the case of attorneys disciplined here who are admitted to the practice of law in other jurisdictions.

Differences in disciplinary action as between this Court and the Supreme Court could give rise to practical difficulties for the disciplined lawyer. If the Supreme Court's discipline be more severe than ours, it will likely control the practical impact because the ability to practice before this court would have little meaning without the ability

to practice law in New Jersey. If this Court's discipline be more severe, the practical impact will be lessened considerably by the lawyer's ability to practice law in New Jersey although not in this Court.

Since the instances in which the two Courts will have different views are not likely to be frequent, and since the practical impact of the Supreme Court's view will necessarily predominate, we do not think the risks are sufficiently great to permit the withholding of different views when they are held by this Court.

ORDER

For the reasons stated, it is hereby ORDERED that the name of Arthur Lawrence Abrams be, and the same hereby is, stricken from the roll of attorneys permitted to practice before this Court, and until the further order of the Court.

DATED: 12-10-74

s/ LAWRENCE A. WHIPPLE, Chief Judge

s/ JAMES A. COOLAHAN, Senior Judge

s/ GEORGE H. BARLOW, U.S.D.J.

s/ FREDERICK B. LACEY, U.S.D.J.

s/ VINCENT P. BIUNNO, U.S.D.J.

s/ HERBERT J. STERN, U.S.D.J.

s/ H. CURTIS MEANOR, U.S.D.J.

Original to Clerk

COHEN, Senior Judge, with whom Judge FISHER joins, dissenting:

It is well settled that the federal judiciary may review the results of a state court proceeding involving the discipline of an attorney. Both the scope of such a review, and the weight to be accorded a state court's disposition are set forth in *Selling* v. *Radford*, 243 U.S. 46 (1917). A case of more recent vintage which addressed similar questions, and affirmed the vitality of *Selling* was *Theard* v. *United States*, 354 U.S. 278 (1955). While I do not question the power of this court to impose a sanction different from that imposed by the Supreme Court of New Jersey, I question the advisability of such a course of action. Furthermore, although this court may act independently of the state court determination, such independence is narrowly confined by the language of *Selling* itself. The Supreme Court took pains to mark the limited scope of federal review:

> ". . . [W]e should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that *some other grave reason* existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except

upon the conviction that, under the principles of right and justice, we were constrained so to do." 243 U.S. at 51. (emphasis supplied)

No question is presented here as to whether the hearing accorded the attorney by the state court was consistent with due process, nor is there any dispute regarding the facts. What, then, is the "grave reason" for this court to pronounce a harsher judgment than that imposed by the state judiciary? I must confess that I cannot discern in the majority opinion the answer to this crucial question. The majority cites *In re Ruffalo*, 390 U.S. 544 (1968) and *In re Wilkes*, 494 F.2d 472 (5th Cir. 1974) in support of its position that the federal judiciary must independently act in disciplinary matters. These cases, however, simply affirm the principles of due process which must be followed in the conduct of such disciplinary proceedings. Neither these cases, nor the instant case, deal with a "grave reason," which would justify a different disposition by this court.

Notwithstanding the absence of a response to the crucial question of "grave reason," I dissent as a matter of policy. Assuming that the purpose of the harsh sanction advocated by the majority is to deter future wrongdoers, deterrence is certainly not advanced by the possibility that Abrams may, at some future time, be permitted to practice in the state courts. While there may be cases which might justify disparate treatment, I am not convinced that this is such a case.

The majority takes issue with the Supreme Court of New Jersey for distinguishing this case from *In re Colsey*, 63 N.J. 210, A.2d (1973), where the attorney was disbarred. Placing aside for the moment the question of whether this court should engage in a contest

with the State Supreme Court over the merits of the distinction, this case is distinguishable from *Colsey* in at least three ways: (1) in this case, the disciplined attorney himself, as a part owner of the business, was a victim of the extortion; (2) here, the disciplined attorney did not retain part of the "pay-off" as a "fee"; and finally, (3) unlike *Colsey* there was no deliberate attempt in this case to perpetrate a tax fraud.

I do not find the state court's distinction to be without basis. The majority's position, simply stated, is:

> "Professional misconduct, like fraud, takes many forms. Variations in detail are not significant when the underlying character is the same." *Ante* at 2.

This is an oversimplification of the facts, and of the state court opinion.

I do not quarrel with the sentiments expressed by the Court with regard to unethical conduct; in fact, I wholeheartedly endorse such a standard for all attorneys in all states. In my opinion, however, such sentiments are largely irrelevant to the true import and impact of the majority opinion.

It is quite understandable that the Court should be reasonably exercised and concerned with the improprieties of members of the Bar, especially in light of the increased awareness of the public to such activities. In this Watergate area of "dirty tricks, laundered money," perjury, obstruction of justice, corruption and related matters, one must not lose sight of the more mundane aspects of the legal and judicial process, as it pertains to the interrelationship of the federal and state judiciary. In its effort to weed out unethical practices, wherever and whenever

they occur, the Court may have lost sight of the past practice in this, and other districts, regarding disciplinary proceedings.

For the first time in the history of the District of New Jersey, or for that matter in the history of any district within the Third Circuit, our Court has refused to be bound by a state court determination in a disciplinary matter. No explanation is given for this sharp divergence from past practice other than the independence of the federal judiciary. Certainly the independence of the federal judiciary cannot be the "grave reason" required by *Selling*. Although the majority opinion recognizes the derivative nature of admission to the federal bar, it glosses over the remainder of the State machinery with regard to bar admission and attorney discipline. Some elucidation would be appropriate in these circumstances.

Fully forty-five of the New Jersey Court rules, with myriad subdivisions, deal with nearly every imaginable aspect of qualifications for admission to the bar, actual admission, and any subsequent discipline of one who is admitted. There is in existence in New Jersey a comprehensive and thoughtful scheme for dealing with the cumbersome and ofttimes complex questions of who should and who should not be authorized to engage in the practice of law.

Admission to practice in our courts is derivative. It is the state who conducts bar examinations. It is the state who maintains committees on character and fitness and ethics. The federal courts have no such machinery and rely exclusively on the state system in determining who shall be admitted to its bar. To make an independent evaluation of applicants to the federal bar would be expensive, cumbersome and unnecessary. Likewise, disciplinary proceedings in our courts ofttimes follow upon the coattails of extensive records and hearings in the state courts and their duly authorized committees. Therefore, in a sense, our disciplinary proceedings are also derivative because based in part on a previously compiled state record.

With this structural background in mind, it is difficult to see the basis for this sudden surge of independence on the part of our Court. Disparity does little to bolster the public respect for the judiciary and does less for federal-state cooperation.

In this regard let us examine the possibly anomalous results of this newly found independence. An attorney suspended from practice for one year by the state system, but disbarred by the federal system, would thereafter be permitted to practice in the state courts but not in the federal courts. Is this person a practicing attorney or not? Are the ethical sensitivities of the federal bench so much greater than their state counterparts? What is the public to think of such a situation, especially with its current disenchantment with the legal profession?

What of comity? After long years of joint efforts to ease the natural tensions between two parallel judicial systems operating within the same state, are we to totally disregard all notions of coordination? There are already enough areas of potential friction between the state and federal judiciaries. *See Helfant* v. *Kugler,* 500 F.2d 1188 (3rd Cir. 1974) *cert. granted,* U.S. , 43 U.S. L.W. 3291 (Nov. 19, 1974). On August 16, 1974 the Conference of Chief Justices unanimously passed a resolution urging greater cooperation and communication between state and federal courts. (See Appendix A). I am reluctant to carve out yet another area of possible

abrasiveness, particularly where the facts do not require such action. The majority believes, however, that an independent disciplinary proceeding is necessary. While *Selling* v. *Radford, supra,* permits such an independent examination, it does so within narrow limits. I believe that my colleagues have transcended those limits. I believe that under certain circumstances, a sanction other than the one imposed by the state court might, perhaps, be appropriate. I can discover no "grave reason" for departing from the judgment of the Supreme Court of New Jersey in this case. Such a course of action flies in the face of comity, and should be undertaken with great reluctance. As has been pointed out in another context, "comity" is

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971).

With all due respect, I do not believe that the majority has shown the proper regard for what has traditionally been a state function. I conceive the majority opinion to be analytically unsound, and an unwise disservice to the concept of federal-state cooperation.

It would seem to be incumbent upon our court to engage in extensive discussions and negotiations with the New Jersey Supreme Court in order that some orderly procedure might be established to integrate and accommodate the state and federal disciplinary systems. The Supreme Court of New Jersey has already indicated its

willingness to conduct such joint efforts. A system should be devised whereby the federal bench can review the evidence, make recommendations, submit its views, and generally participate in any judicial disciplinary hearings on the state level. But the New Jersey Supreme Court should render the decision and the federal bench, as a matter of policy, should be guided thereby. This is the only method which would recognize the derivative nature of practice in the federal courts.

Of course, our court should be more concerned, than the State courts, where a disciplinary proceeding is based upon misconduct of a federal official, or upon conviction of a federal offense, or upon some transgression committed during an appearance in a federal court. In instances such as these, where the federal system gives rise to the disciplinary proceedings, the state court has displayed no reluctance in taking appropriate action with dispatch. Heretofore, the New Jersey Supreme Court has exercised a diligent watch over just these sorts of transgressions. *See e.g.,* the most recent case of ***In the Matter of Louis M. Turco,*** —— N.J. ——, —— A. 2d —— (D-11, filed Nov. 6, 1974), wherein an attorney who had previously pleaded guilty to tax fraud in the federal court was subsequently disbarred from practice in the state courts. This is but one example of the good faith effort on the part of the State Supreme Court to accommodate the federal system. Furthermore, it serves as another example of the cooperation which has heretofore existed and which is now threatened.

Finally, the majority opinion contends that disparity between the state and federal systems will be infrequent. It cannot be said with certainty that differences in opinion will be infrequent. We have one example before us

—how many others are lurking in the "corners of our profession?" Even one difference of opinion requires some joint federal-state effort at resolution. The time has come to openly confer with the members of the New Jersey Supreme Court in the hopes of arriving at an expeditious solution to the problem which now threatens to rend asunder the fragile fabric of cooperation between the two systems. For the present, however, I strenuously resist any effort on the Court's part to seize this particular opportunity to impose a sanction different from that of the New Jersey Supreme Court.

As Chief Justice Hughes has recently pointed out in a letter to Chief Judge Whipple of our court: "After all, we act under like constitutional obligations, have equally high respect for our profession and serve the same public in the administration of justice."

For the above reasons, I would direct, as did the State Supreme Court, that Arthur Lawrence Abrams be suspended from the practice of law for one year, and until the further order of this Court.

MITCHELL H. COHEN, SENIOR JUDGE
UNITED STATES DISTRICT COURT

CLARKSON S. FISHER, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX "A"

RESOLUTION

VIII

WHEREAS, the Conference of Chief Justices in 1971 endorsed the efforts of the Chief Justice of the United States to improve the channels of communications between state and federal courts and to eliminate abrasiveness in state-federal judicial relationships; and

WHEREAS, much improvement between state and federal judicial relations has resulted from an interchange of ideas and a discussion of mutual problems between state and federal judges through State-Federal Judicial Councils; and

WHEREAS, in recent months there have been in a few federal district courts and circuit courts of appeals certain decisions which threaten to negate the effectiveness of efforts to improve state and federal judicial relationships in that these federal courts, below the United States Supreme Court level, unreasonably have invaded areas which historically and traditionally are recognized to be within the exclusive jurisdiction of state courts, as for example the matter of state bar admissions and the internal administration of state court systems;

NOW, THEREFORE, BE IT RESOLVED by the Conference of Chief Justices duly assembled in Plenary Session on August 16, 1974, as follows:

1. That each state judicial system is urged to continue its efforts to bring about a cooperative and cordial relationship between state and federal judicial systems through open communication and with the interchange of ideas and mutual recognition of

the responsibilities of each system through State-Federal Judicial Councils and other means.

2. That the "exhaustion of state remedies" doctrine must be strictly adhered to in areas which have historically and traditionally been within the exclusive jurisdiction of state courts, including state bar admissions and internal administration of state court systems and in the joint jurisdiction of the federal and state authorities; otherwise, the marked improvement in state-federal judicial relationships which has occurred in recent months will be substantially eroded.

3. That various organizations interested in proper state-federal judicial relationships, including State-Federal Judicial Councils, the Federal Judicial Center, the Administrative Office of United States Courts, the National Conference of Federal Trial Judges, the Judicial Conferences of United States Courts, and the State-Federal Judicial Relations Committee of the American Bar Association, be called upon to bring to the attention of their judicial members the importance of maintaining proper and cooperative relationship between state and federal judiciaries in the areas above delineated.

4. That Congress is called upon to enact legislation requiring the exhaustion of state judicial remedies before federal courts may entertain jurisdiction of matters which have been traditionally and historically within the exclusive jurisdiction of state court systems such as bar admissions and the internal administration of state judicial systems.

APPENDIX E

Per Curiam Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

No. D-1—September Term 1973

In the Matter of

ARTHUR LAWRENCE ABRAMS,
an Attorney at Law.

Argued February 19, 1974. Decided June 4, 1974

Mr. Frederick C. Vonhof for the order.

Mr. Clive S. Cummis argued the cause for the respondent (*Messrs. Sills, Beck, Cummis, Radin and Tischman,* attorneys; *Mr. Jeffrey Barton Cahn* and *Mr. Jerald D. Baranoff,* on the brief).

PER CURIAM:

The Essex County Ethics Committee charged the respondent with ethical violations in a presentment dated May 16, 1973, later modified in a supplemental report dated December 13, 1973.

In 1967 the respondent became aware, through C. B. Snyder, a business associate and real estate broker, of the impending sale of Jersey City waterfront property which was suitable for transformation into a port facility. He communicated with his client Ezra Sensibar, Presi-

dent of Construction Aggregates Corporation, which specializes in the building and operation of port facilities. Thereafter the ESCA Corporation was formed to bid on the Jersey City property. The respective ownership interests in ESCA were Construction Aggregates Corporation 60%, Snyder 20% and respondent 20%. An auction of the property was held in Jersey City on August 1, 1967 and ESCA was the successful bidder for the sum of $2,040,000. The property was isolated from city services and it was necessary that water and sewer facilities as well as access roads be provided. A meeting was arranged with John V. Kenny, the then Hudson County political leader, who assured Sensibar that there would be wholehearted official cooperation in the development of the port facility proposed by ESCA.

Towards the close of 1968 Jersey City adopted resolutions letting contracts for the construction of roads and the laying of sewer and water pipes to the property acquired by ESCA. At about the same time, a resolution was adopted authorizing payment of a 5% brokerage commission to C. B. Snyder Realty, Inc. The commission amounted to $102,000 and half, namely, $51,000, was paid to the respondent pursuant to an earlier arrangement between Snyder and the respondent. The respondent testified that although the $51,000 was his to do with as he pleased, he considered that he should ethically turn it over to ESCA. He did that by placing it in an "Arthur Lawrence Abrams Trust Account" in the National Newark and Essex Bank; at one point he described the $51,000 in the trust account as "an emergency fund."

As time went on and as the financial commitments of ESCA (renamed Port Jersey Corporation) and those associated with it became deeper and deeper, the lack of cooperation by the Jersey City officials became evident.

Despite the resolutions letting contracts for the construction of roads and the laying of sewer and water pipes, work had not been commenced and permits had not been issued when the respondent and Snyder were advised that a so-called "political contribution" was expected by the Jersey City officials. It was suggested that Sensibar should see Flaherty, then President of the Jersey City Council. The respondent testified that he called Sensibar who said "leave it to me." Sensibar testified that when he met with Flaherty on April 19, 1969 he knew that the money that had already been invested "would all go down the drain if we didn't somehow make peace and get quick cooperation from City Hall." He was disposed to make "a campaign contribution" of $20,000 in cash "to get that peace." He testified further that after his April 19 meeting with Flaherty he conferred with Snyder and the respondent and "they both said that it was unrealistic to expect that we could do as much construction work, as much business as we were doing in Hudson County without acceding to a shakedown of some kind. They thought that $20,000 in the circumstances might be nominal and they urged that I should arrange for us to pay it." Under date of April 22, 1969 the respondent issued a check in the sum of $20,000 on his trust account. The check was made payable to Construction Aggregates Corporation and was stated on its face to be "For Engineering Services." The respondent sent the check to Sensibar who cashed it and who arranged to have the $20,000 in cash delivered to Flaherty.

The presentment embodied the following findings with respect to the $20,000 payment: "Respondent characterizes such payment as extortion and the city officials as extortioners and what has transpired would so indicate, however, respondent was a participant and it was through

the trust funds in his possession that such payment was made. Respondent was well aware of the reasons underlying the making of such payments. Though respondent owed a duty to his client to act zealously in its behalf and for its best interests, and to make disbursements from the trust fund as it directed, nevertheless respondent was under an obligation to act within the bounds of the law, and obey his own conscience. Direct participation is denied by respondent, however, he was the conduit through whom such payments were made, and to that extent he did participate in the transaction."

In October 1970 Mr. MacMillan, Vice President of Port Jersey, told the respondent that several months earlier he "had a problem with a building permit" and had paid out the sum of $1200. He requested a check for the $1200 from the respondent's trust account but by that time the funds in the trust account had apparently been transferred to a certificate of deposit in the National Newark and Essex Bank in the name of Port Jersey. In response to MacMillan's request the respondent arranged in effect for the bank to issue its check dated October 7, 1970 in the sum of $1200 payable to Port Jersey. The respondent testified that he did not learn until much later that the $1200 represented "a pay-off to the building department of Jersey City." In the presentment the Committee made no specific factual finding in this regard although in its supplemental report, after referring to both the $20,000 payment and the $1200 payment, it said: "The total testimony reflects respondent's knowledge that the enterprise of which he was one of the principals, as well as its legal counsel, was compelled to pay $21,200 to certain public officials in aid of the furtherance of the development of the project."

In the presentment the Committee found that $3860 had been paid from the respondent's trust funds to Frank Murray, President of the Jersey City Local of the International Longshoremen's Association, in violation of N.J.S.A. 2A:93-7. However, in the supplemental report this finding has been withdrawn. The Committee was satisfied on the basis of further testimony submitted to it, "that there was no impropriety on the respondent's part in participating" in the payment to Murray. The presentment also contained a finding that the sharing of the brokerage commission in the manner described was violative of N.J.S.A. 40:60-26(d)—since repealed by L. 1971, c. 199, § 29. However we gather from the supplemental report that this finding has also been withdrawn by the Committee.

The supplemental report reiterated the Committee's earlier finding "that the respondent knowingly was a conduit in the furtherance of illegal payments to public officials." It rejected the respondent's contention that he had no alternative but to comply with Sensibar's request that he turn over $20,000 from the trust funds so that it could be used to satisfy the extortionate demands of the city officials. It suggested that the respondent might have instituted legal proceedings to obtain the required official action, that he might have reported the matter then or in due time thereafter to the State or other duly constituted law enforcement officials, or that he might have in timely fashion withdrawn completely from the matter. In any event the Committee was firm in its opinion that the respondent's ethical duties were not to be measured simply by the "legality or illegality of his client's acts" and that compliance with the client's demands "for moneys in the lawyer's possession under the circumstances of this case is not a full discharge of the lawyer's ethical obligation."

Appendix E

The Committee stated that it reached its conclusions "with regret because the record in this case and the personal knowledge of the members of the Committee establishes beyond question that respondent's performance as a man and as a member of the Bar of this State over the years is a record not only of outstanding accomplishments but also of dedication to the highest ideals of the legal profession. He interrupted his legal career to serve in the Armed Forces. When he returned to civilian life and the practice of law he devoted much of his time and strength to the service of the members of the Bar and the students of the law; he has taken an active part in bar association activities; he is a former chairman of this Committee; he has taught law and he has assisted other teachers of the law in working on drafts of uniform laws."

We do not consider that either the payment to Murray or the sharing of the brokerage commission is now before us. And we are not satisfied that the record is sufficient to establish participation by the respondent in the $1200 payment to Jersey City's building department. However we consider that the respondent's knowing participation in the $20,000 payment to the Jersey City officials was firmly established. The purposes surrounding the original creation of the trust fund is nowhere unequivocally acknowledged though the Committee in its presentment concluded that the "$51,000 retained in respondent's possession in a trust account that contained only Port Jersey money was used by Port Jersey to make irregular payments which would not be reflected upon the corporate books of Port Jersey." Be that as it may there is no basis for doubting that the respondent was fully aware that the $20,000 check drawn by him from the trust funds in his possession and turned over by him to Sensibar was to be cashed and the cash to be used to

Appendix E

satisfy the illegal extortionate demands of the Jersey City officials. The respondent also was fully aware that the $20,000 was not "For Engineering Services" as the face of the check drawn by him set forth; the fact that Sensibar's company may then have been owed moneys for engineering services was immaterial since the $20,000 was not actually intended or disbursed as payment for its engineering services.

Little regard need be paid to the "political contribution" cover by the Jersey City officials. They well knew that their demand was a corrupt one involving extortion or bribery or both. See *In re Colsey,* 63 N.J. 210, 211 (1973); *cf.* N.J.S.A. 2A:105-1; N.J.S.A. 29:93-6; *State* v. *Begyn,* 34 N.J. 35, 45-49 (1961); *State* v. *Seaman,* 114 N.J. Super. 19, 31 (App. Div.), certif. denied, 58 N.J. 594 (1971), *cert. denied,* 404 U.S. 1015, 30 L.Ed.2d 662 (1972). Similarly all of the parties including the respondent well knew the illegal nature of the demand and that "the payment would be corrupt." *In re Colsey, supra,* 63 N.J. at 211. It may be assumed, as the respondent asserts, that here there was extortion rather than bribery and that Port Jersey was the victim rather than the movant. But, as was pointed out in *Colsey,* "with respect to the ethics charge, it would be no defense that respondent's conduct, if unethical, related to 'extortion' rather than 'bribery' ". 63 N.J. at 211 n. 1.

It is urged before us that Sensibar should be viewed simply as an unwilling victim who bowed to extortionate demands and as such is not subject to charges of criminality or illegality. But we are not here concerned with the consequences of this conduct to Sensibar. We are concerned with the respondent, a member of the bar who, apart from his financial interest in the venture, was acting as legal counsel and was bound by the high ethical

principles of his profession. Those principles clearly dictated that he play no part whatever in the corrupt $20,000 payment to the public officials of Jersey City. We are entirely satisfied that the respondent's participation in the corrupt payment, to the extent described earlier in this *per curiam,* was unethical and calls for some measure of discipline.

In *Colsey* (63 N.J. 210) an attorney was disbarred for knowingly participating in a transaction which involved a corrupt payment to satisfy an illegal demand by a public official. However, unlike the situation here, the attorney was not in any sense a covictim, played a very active part in the corrupt transaction itself and "used the fact that he was a member of the bar as part of the mask for the crime by creating the appearance that a professional fee was involved." 63 N.J. at 215. We agree with the position of respondent's counsel that *Colsey* is distinguishable and that disbarment is not called for. But we disagree that "discipline which exceeds reprimand" would be excessive. Reprimand may sometimes be appropriate where there has been a lesser ethical violation not involving corrupt conduct as in *In re Kamp,* 40 N.J. 588 (1963) and *In re Abrams,* 56 N.J. 271 (1970). See also *In re A. and B.,* 44 N.J. 331 (1965). But where, as here, there has been knowing participation in corrupt conduct it would not be at all appropriate and would not represent a responsible discharge of the unfortunately necessary duty placed upon us by Article VI, section 2, paragraph 3 of our Constitution. Though the original creation of the trust fund itself by the respondent was suspect, the record does not permit a finding that it was specifically designed for the illegal payment. But the record does permit and indeed compels a finding that the respondent not only permitted its use for the illegal pay-

ment but knowingly participated in the illegal payment itself by drawing the check and misstating on its face that it was for engineering services. Indeed in the light of Sensibar's testimony we are led to the finding that the respondent did not resist the payment but on the contrary supported it. Surely it must be recognized that such conduct was grossly inimical to the ever-present hope of the elimination of official corruption and the maintenance of high standards in the legal profession.

The determination as to the measure of discipline is difficult and, as we have repeatedly pointed out, "each case must rest largely upon its own particular circumstances." *In re Greenberg,* 21 N.J. 213, 225 (1956); *In re Baron,* 25 N.J. 445, 449 (1957). We have given due consideration to all of the interests involved and the mitigating factors which appear in the record and are set forth by the Committee in its presentment and supplemental report. We have concluded that the respondent's professional dereliction warrants suspension from the practice of law for a period of one year and until further order; judgment to that effect will be entered.

Supreme Court, U. S.
FILED
OCT 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-487

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,

Petitioner,

v.

ARTHUR LAWRENCE ABRAMS,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Spevack v. Klein, 385 U. S. 511 12
Teitelbaum, In re, 253 F. 2d 1 (7th Cir. 1958) 15
Thread v. United States, 354 U. S. 278 8
United States v. Rice, 327 U. S. 742 15
United States ex rel. Schnitzler v. Follete, 406 F. 2d 319 (2d Cir. 1969) 14
Vitarelli v. Seaton, 359 U. S. 535 13
Willner v. Committee on Character & Fitness, 373 U. S. 96 12

Statute Cited

28 U.S.C.:
Sec. 1254(1) 1, 13

Rules Cited

Local Rule 7 ..... 2, 13
Rule 8 10
Rule 19 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-487

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,

Petitioner,

v.

ARTHUR LAWRENCE ABRAMS,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Jurisdiction

Respondent denies that 28 U.S.C. Sec. 1254(1) can serve as the basis upon which this Court may acquire jurisdiction in that the "United States District Court for the District of New Jersey" was not a "Party" to the proceedings in the Court of Appeals and in that the United States Attorney, appearing before the Court of Appeals as "Attorneys for the Order", is without standing to prosecute a petition for certiorari.

Questions Presented

May a Federal District Court disbar a lawyer by procedures which (a) ignore the rule established by this Court in *Selling* v. *Radford,* (b) fail to comply with that Court's local rules and (c) fail to comport with the requirements of due process by disbarring, at least in part, on conduct not clearly charged in advance?

Counter-Statement of the Case

The case comes before this Court on a petition for a writ of certiorari by the United States District Court for the District of New Jersey, purportedly as an entity or body politic, to review the unanimous overturning, by the Court of Appeals, of its disciplinary Order of disbarment imposed upon Arthur Lawrence Abrams, the Respondent.

Disciplinary proceedings against Mr. Abrams were commenced initially within the jurisdiction of the New Jersey state courts. The New Jersey Supreme Court, after hearings before the Essex County Ethics Committee and argument before it, found Abrams to be in violation of certain ethical precepts that, considered with the elements of mitigative evidence presented by him, justified the imposition of a suspension for the term of one year and until the further Order of the Court (App. E of Petitioner).

Subsequent to this state court determination, the Federal District Court, relying on the record compiled during the state court inquiry, initiated its own disciplinary proceeding. Commenced by Order to Show Cause, the District Court, citing Local Rule 7 (Petitioner's Brief,

pp. 4-6) asked that Abrams show cause why he should not be disciplined by that court on the bases (1) that Abrams had been suspended from the practice of law by Order of the Supreme Court of New Jersey and (2) that Abrams "may have been guilty of conduct unbecoming a member of the Bar of this Court" (CA, pp. 434a).

On the return day of the Order, argument by counsel for Abrams before the District Court was held. No petition stating the charges pending against the Respondent was issued. No evidential hearing was called; no brief was filed in opposition to that submitted by Abrams as neither the United States Attorney nor any committee of lawyers practicing within the district of New Jersey were ever appointed to prosecute the matter.

Indeed, there were no further proceedings within the District Court at all except for the issuance of its opinion and order which, by its majority, struck Respondent from the roll of attorneys eligible to practice before that court (App. D, p. 42a).

The United States Court of Appeals for the Third Circuit, sitting *en banc* for the appeal from the District Court Order, unanimously held that the Order of disbarment (App. A of Petitioner, p. 3a fn. 1) could not stand and divided only as to whether an outright reversal or a remand was required under the circumstances shown.

Judge Aldisert, in the majority opinion, observed that, pursuant to long standing precedent, the District Court was not "totally free to ignore the original state proceedings" and to pretend that the federal Court's determination could proceed as if it were "in a vacuum" (App. A, p. 13a). Ths disciplinary power of the Federal Courts, unfettered in the abstract, becomes "circumscribed" in practice to the extent that the District Court eligibility

standards for admission are derivative from state admittance and to the extent that its disciplinary procedures follow subsequent to and rely totally upon the record created by and the legal and factual determinations drawn by the state court system of discipline (App. A, pp. 15-16a).

Applying those principles, the majority concluded that the District Court had erred by ignoring the limiting effect of derivative admission, the limiting effect of finding "no adjudicative facts on its own; instead it relied exclusively on those found by the state court" (App. A, p. 19a), and the limiting effect of relying upon a New Jersey case as reasoned authority for its action after the case had been drained of its precedential force by the State Supreme Court in the case at bar when it was expressly distinguished from the circumstances shown herein. As stated by the Circuit Court (App. A, p. 21a).

> "[T]he district court was not free to rely upon *Colsey* for New Jersey precedential guidance. Having elected to bottom its own rational analysis on New Jersey law, the controlling case for the district court was *In re Abrams*—not *In re Colsey*. And, in *Abrams*, the New Jersey Supreme Court explicitly concluded that *Colsey* was distinguishable. . . . [T]he Court could not, with fealty to consistency, disregard the interpretation of New Jersey state law by that state's highest court. . . ."

Additionally, the majority held that the proceedings in the district court were deficient since that Court, though "obliged to follow its own procedural rules," had failed to confine its inquiry, in the absence of the independent investigation allowed by their rules, to the "only charge considered" by the state court (App. A, pp. 22-24a).

Judge Rosenn, in a concurring opinion, concluded that the long established precedents of this Court created well defined and proper standards for justifying deviation in discipline from that imposed, previous to its action, by the state's highest court. In light of these precedents, he observed:

> "The District Court did not adequately explicate, and I do not perceive, any grave reasons for choosing more severe punishment than imposed by the Supreme Court of New Jersey."

The three remaining judges, though holding that the lower court judgment "cannot stand" because it violated fundamental notions of due process, believed that a remand was appropriate to provide an opportunity for the district court to file additional charges or to determine anew the extent of the discipline imposed limiting their consideration to the single issue projected from the state proceedings.

• • •

The facts of Abrams' conduct, often hidden beneath the weightier institutional arguments, seem no longer to be in substantial dispute, except for the contorted inferences or "observations" drawn from them by petitioner. The Court of Appeals accepted, for purposes of the appeal, and incorporated into its opinion the statement of facts presented within the brief of the United States Attorney (App. A, p. 3a). That which appears as number 1 of petitioner's statement is substantially similar to that part of the opinion of the Court of Appeals. Though respondent takes issue with certain of the facts alleged, our disagreement is not material at this posture of the matter. What is significant is that the Court of Appeals, having accepted the factual premises of the United States Attorney, found such legal and procedural error as to require a reversal of the judgment of the District Court.

Respondent does, however, take issue with what petitioner defines as "observations" drawn from the facts by the District Court (Brief of Petitioner, at p. 15). Of the four original charges filed by the Essex County Ethics Committee, only one, concerning Abrams' inferred knowledge that a $20,000 check he mailed to his client and co-venturer Construction Aggregates Corp. would be forwarded as an extortion payment to officials within Jersey City, was held by the State Supreme Court to be established by the record (App. E, p. 58a). Nevertheless, the district court chose to go beyond that charge and to determine, without any additional petition setting forth new charges or evidential hearing, that Abrams, in possessing a 20% interest in his client's enterprise, had taken a step which "interfered with the exercise of free judgment on behalf of the client," and that an inference may be drawn, in the absence of any offered explanation therefor, that the receipt of the $102,000 commission from the City of Jersey City based upon the purchase of the Port Jersey property was the result of collusion with public officials to create a "device to divert public funds into channels from which they could be repaid secretly to the public officials. . . ." (App. D, p. 40a).

The idea that the single charge which remained in the state proceeding can be expanded, even by the most studious of "observations", to include, within its confines a new and unexplained charge that Abrams was part of a conspiracy to defraud the city is to stretch the construction of words beyond the meaning those words are meant to convey.

If we accept the hypothetical construct that Abrams and Flaherty purposefully created the $102,000 Commission as a vehicle through which the monies could flow to the "organization" as contribution from Port Jersey, why,

knowing the size of the "reservoir", did Flaherty settle for only $20,000? Why, indeed, if the payment of $20,000 had been pre-arranged as a bribe, did the Port Jersey people engage in the machinations of resistance to it for over four months? The "charade", if such it was, played out by Sensibar over the period January-April 1969 was costly enough to place both Port Jersey and Construction Aggregates Corporation at the precipice of insolvency. None of the construction advances could be drawn against so long as road access was not gained. Interest and property taxes aggregated to over $3,000 per day. What sense did it make for Sensibar to hold out at that cost if his lawyer had already made a corrupt arrangement for him?

Under these essentially uncontroverted facts, the Essex County Ethics Committee, the last body to hear any "live" testimony, found that Abrams "characterizes such payment as extortion, and the city officials as extortioners and what has transpired would so indicate . . ." (CA-230a).

Following the expiration of the one year suspension imposed by the New Jersey Supreme Court, Abrams applied for reinstatement as an attorney within the state court system from which the Ethics proceedings had first been initiated. Following a hearing before and report by the County Ethics Committee, respondent was, by order of the supreme court, reinstated to their bar in July of 1975 (App. B of Respondent). Abrams remains to this day ineligible to practice in the United States District Court for the District of New Jersey since the mandate of the Court of Appeals, following the reversal of the disbarment by the District Court, has been stayed pending this petition for a writ of certiorari.

ARGUMENT

1. Petitioner's assertion, mouthing the considerations of Rule 19, that this case presents issues of "first impression," seriously misconstrues the *ratio decidendi* of the Court of Appeals.

Perhaps it is most important to emphasize what was not decided below. The Court of Appeals did not hold that a district court was bound to give *res judicata* effect to the measure of discipline imposed by a state court, thereby straying from the well settled principles of *Selling* v. *Radford*, 243 U. S. 46, 50 and *Thread* v. *United States*, 354 U. S. 278. Both these cases provide that the federal court may refuse to give effect to the prior judgment if it finds, upon an "intrinsic consideration" of the record, the absence of due process, an infirmity of proof or the existence of some other "grave reason" (App. A, p. 20a).

Secondly, the Court of Appeals did not hold that the federal courts must necessarily await the completed process (charges, findings of fact, punishment) undertaken by the state court system and then rely exclusively upon that record to the preclusion of a totally separate and independent federal system (App. A, p. 15a). The majority opinion, contrary to the submission of the petitioner, does not seek to or effect a foreclosure of any future action by a district court, pursuant to its rule-making power, to wipe the slate clean and build its own system of admission and discipline independent of the state courts.

What it does say is that at present, the slate is not clean and that to the extent that federal admission is

derivative to state admission, to the extent that federal bar discipline is subsequent to and depends upon the state court record, and to the extent that precedents guiding the imposition and severity of discipline are exclusively those decided by the State courts—then to the same extent is the district court bound (subject to the narrow exceptions delineated by this Court in *Selling*) to the charges, the findings, and the measure of discipline imposed by the state's highest court.

The distillation of the opinion of Judge Aldisert (App. A, pp. 15-16a) merely restates what was, prior to the action of the District Court, the well settled foundation for the actual practice of the federal courts since the foundation of the Republic. The Court of Appeals, in reversing, merely determined that the district court judgment was an aberration which could not be permitted to stand in light of a plethora of long established precedents holding to the contrary.

No other district court has ever, by reported decision or by current practice, imposed more stringent discipline upon an attorney than that meted out, previous to its action, by the state's highest court. None of the sixty-eight district courts responding to a survey inquiring as to the existence of any deviations from the state disciplinary advised us as to any instances of such cases (Respondent App. A). If indeed there is any court acting inconsistently with prior precedent, we would submit that it is the very court reversed by the Court of Appeals in the instant matter.

Petitioner does not even attempt to show, nor could he, any conflict with other Courts of Appeals as to the ap-

plicability of the line of cases commencing with *Selling*, supra.*

Therefore, we would submit that the within case presents no more unique an issue than the application of principles previously settled by this Court to the facts and circumstances established in the state court record and that the judgment of the Court of Appeals did no more than restore these well settled principles to their hitherto unchallenged status.

2. Petitioner in its Brief attempts to deflect the statement by the Court of Appeals that a district court, acting subsequent to and derivative from the state court record, "must not operate in a vacuum" nor may it be "totally free to ignore the original state proceedings" by citing to the purported practice of this Court of disbarring lawyers, following an Order to Show Cause, based on a suspension by a state court. Other than the Orders themselves, which are cryptic in their language, no opinions were issued nor standards promulgated which discussed, to any extent, the rationale for the action.

By disbarring each and every attorney who becomes the subject of an Order to Show Cause as a result of a state court suspension, this Court has chosen, either by practice or by interpretation of its Rule 8, to set a uniform standard that state court suspension shall be a sufficient basis for disbarment.

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* Petitioner does, for purposes of "contrast", allude to the recent decision of *In re Richard G. Kleindienst* by way of footnote at p. 21 of its brief. In labeling that decision as one decided by a "circuit" court, petitioner seems to suffer from the delusion that the District of Columbia Court of Appeals is the same judicial body, which it is not, as the United States Court of Appeals for the District of Columbia. It would only be a judgment of the latter body that would be coordinate to and capable of creating a "conflict" with the judgment of the Court of Appeals here under review.

Neither the District Court nor petitioner has ever claimed that the suspension of Abrams imposed by the New Jersey Supreme Court, without more, was the basis for his disbarment by their Court. In the instant case, the District Court, on an ad hoc basis, not justified by any rule or practice, acted to disbar Abrams, not for his being suspended, but for their preception of his underlying conduct. Whether a district court might, exercising its autonomous power to regulate the lawyers who populate both its bar and that of the New Jersey State Courts, promulgate a rule or formulate a uniform practice to disbar permanently all those who theretofore suffered a suspension by the State Courts is an issue in abstraction not reached by or necessary to the disposition of this case.

Moreover, there is no indication within the orders of the Supreme Court as to the permanency of its actions. Petitioner cites no case establishing the proposition that the Supreme Court would refuse to reinstate a theretofore disbarred attorney once the State Court, which initially disciplined him, had restored him to his place at its bar and certified that the attorney had the requisite character to be a member of its bar.

In July of this year, Arthur Lawrence Abrams, pursuant to his petition, and following a hearing before and the report of the Ethics Committee, was reinstated by the Supreme Court of New Jersey as an attorney of that State (App. B of Respondent). Until the reversal by the Court of Appeals, the mandate of which was stayed pending application to this Court, there was no hint within the opinion of the District Court majority, notwithstanding reinstatement in the state court, of anything but permanency to their judgment, no glimmer that expiation and rehabilitation might some day permit reasonable hope of his being granted reinstatement by that tribunal.

3. Petitioner makes the altogether curious assertion at p. 25 of its brief that violation by the district court of its own procedural rules or those procedural safeguards incorporated within the concept of due process was unreviewable by the Court of Appeals. Not surprisingly, no authority is cited for this proposition. For there is none to support it.

There surely is nothing "novel" in the requirement that an attorney be granted advance notice of the charges against him and an opportunity to be heard as to those charges. When the District Court determined to expand their inquiry beyond the "only charge considered" by the state courts, it owed Abrams those simple obligations of fairness.

That a disbarment may not stand where the basis for discipline is unethical conduct which, in whole or in part, was not charged in advance had already been well settled by *In re Ruffalo,* 390 U. S. 544, 551. See also *Spevack* v. *Klein,* 385 U. S. 511; *Willner* v. *Committee on Character & Fitness,* 373 U. S. 96, 103.

Petitioner's attempt to elude the grasp of *Ruffalo* on the basis that in the instant case no new charge was ever filed is feeble indeed. Can the petitioner really believe that the absence of a formal charge as to the commission fund, however belated it might have been filed, makes this situation anything other than a more egregious violation of due process than that perpetrated in *Ruffalo*?

As for the newly arrived disclaimer that the "additional matters considered" (Petitioner's Brief at p. 27) by the district court were not of material import, can the petitioner seriously believe that the finding in the District Court opinion that Abrams conspired with Council President Flaherty to defraud the City by channeling the

commission funds into secret payments to public officials did not bear substantially on their evaluation of his ethical violations?

Moreover, aside from what due process would otherwise require, the action taken by the District Court was fatally defective since that Court blatantly and consciously disregarded its own local rules (Rule No. 7). That Rule established the method by which the District Court would operate in imposing discipline where an attorney was alleged to be "guilty of conduct unbecoming a member of the Bar of this court." (Petitioner's Brief, p. 4). No averment even appears within the petition that compliance with the Rule was secured by the actions of the district court. Certainly, there is little that is novel in the statement by Judge Aldisert, in the majority opinion, that the lower court "was obliged to follow its own procedural rules" (App. A, p. 23a). See *Vitarelli* v. *Seaton,* 359 U. S. 535, 539-40.

Therefore, whether calculated against the requirements of due process or the provisions of local Rule 7, the actions of the District Court plainly were deficient. The reversal by the Court of Appeals, being eminently correct and in accord with unquestioned precedent, merely rectified the errors committed and requires no review by this Court.

4. Under 28 U.S.C. § 1254(1), only a "party" to a case in the Court of Appeals may seek review of that judgment in this court. We would submit that neither the "United States District Court for the District of New Jersey" nor the United States Attorney on its behalf was a "party" to the appeal before the Third Circuit and that they are, for this reason and others, without standing to petition for a writ of certiorari.

Ordinarily, a District Court, in deciding cases before it, either originally or on remand is required to follow and be bound by a precedent of its Court of Appeals and its failure so to do would constitute a clear abuse of discretion. *United States ex rel. Schnitzler* v. *Follete,* 406 F. 2d 319, 332 (2d Cir. 1969); *Minnich* v. *Nabuda,* 336 F. Supp. 769, 770 (E. D. Pa. 1972); *Matzner* v. *Brown,* 288 F. Supp. 608, 611 (D. N. J. 1968). Though it may disagree with the views held by the Court of Appeals, the district court may not transmute itself from a court into a "party" to seek a review of the judgment of that superior court.

During the proceedings before the Third Circuit, John J. Barry, Esq., an Assistant United States Attorney, appeared, on behalf of the United States Attorney, as "Attorneys for the Order." As lawyers representing an inaminate object—the Order—the role of the office of the United States Attorney partook of the status analogous to one amicus curiae among many. The office of the United States Attorney did not purport to represent, at that time, the United States District Court for the District of New Jersey nor did it seek an order of intervention by which it would have become a party in its own right.

It is settled that the status of an amicus curiae does not entitle one to be a "party" nor to file a petition with this Court to review a judgment by the Court of Appeals. *International Union, Local 283* v. *Scofield,* 382 U. S. 205, 209; *Ex parte Leaf Tobacco Board,* 222 U. S. 578.

While it seems clear that a District Court may enlist the services of the United States Attorney to assist in proceedings before that court, we find no authority empowering the United States Attorney to appeal from a

Circuit Court judgment reversing an order of the district court in a proceeding, as here, in which the United States Attorney did not participate? Petitioner may well argue that the District Court is drawing upon the sovereign power it shares as an agency of the United States which expands its power beyond that granted by statute. The short answer, it is submitted, is that the Judicial entity known as the "United States District Court for the District of New Jersey" has no power to act in any way, including its right to appeal, not conferred by statute. *United States* v. *Rice,* 327 U. S. 742, 749.

Nor can the invocation of the general public interest create standing to appeal which does not otherwise exist. *Sierra Club* v. *Morton,* 405 U. S. 727. And if the district court may not pursue the matter, surely the position of the United States Attorney on its own is no stronger. *In re Teitelbaum,* 253 F. 2d 1, 2 (7th Cir. 1958).

Finally, if the judges do not possess standing in their judicial capacity to question, by way of review in this Court, the judgment of the Court of Appeals, there should be no doubt that they similarly lack standing even were the caption reformulated to include the names of the judges as individual petitioners.

As the United States Attorney has failed to show its standing to pursue this petition, we would submit that the petition should be dismissed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be dismissed or denied.

Respectfully submitted,

CLIVE S. CUMMIS
Counsel for Respondent
33 Washington Street
Newark, New Jersey 07102

JERALD D. BARANOFF
On the Brief

October 1975

APPENDIX A

Affidavit of Jerald D. Baranoff, Esq., dated March 27, 1975

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In the Matter of
ARTHUR LAWRENCE ABRAMS,
An Attorney at Law,
Appellant.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

JERALD D. BARANOFF, of full age, having been duly sworn according to law, upon his oath deposes and says:

1. I am an attorney at law of the State of New Jersey and an associate with the firm of Sills, Beck, Cummis, Radin & Tischman, P. A., counsel to the appellant, Arthur Lawrence Abrams, in the above listed appeal. I have been responsible for the preparation of the appeal in the within matter under the supervision and direction of Clive S. Cummis, Esq.

Appendix A

2. I was informed by Mr. Cummis that at a pre-hearing conference scheduled before Chief Judge Seitz, attended both by John J. Barry, Esq and Mr. Cummis, the Chief Judge had requested that we supply the Court with as much information as possible as to how other courts have handled the issue posed here.

3. Pursuant to the discussion with Chief Judge Seitz, this firm prepared the form letter attached hereto and made a part hereof as Exhibit A which we addressed and mailed to each of the 89 Federal District Courts situate within the 50 states of this country and the District of Columbia. Letters were prepared and mailed from our offices between the period January 29 to January 31, 1975.

4. To this date we have received responses from the Clerk of the District Court (or a judge in that district writing on his behalf) for 68 of the 89 jurisdictions. I have personally prepared the schedule of responses of the United States District Courts as to their disciplinary practice which is attached hereto and made a part hereof.

5. I hereby certify that I have in my custody and control the responses to which reference is made in the attached schedule. I also certify that the summary or quotations contained therein are an accurate reproduction from the original letters which remain in my possession.

6. I hereby certify that the information contained within the schedule and in this affidavit is true, to the best of my knowledge, and that if willfully false, I am subject to punishment.

JERALD D. BARANOFF

(Sworn to March 27, 1975).

Appendix A

Exhibit A, Form Letter Attached to Foregoing Affidavit

[LETTERHEAD OF
SILLS, BECK, CUMMIS, RADIN & TISCHMAN]

Re: In the Matter of Arthur Lawrence Abrams
an Attorney At Law—No. 75-1029

Sir:

This firm is counsel to Arthur Lawrence Abrams, Esq. with respect to an appeal currently pending before the United States Court of Appeals for the Third Circuit from a disciplinary order entered against him by the United States District Court for the District of New Jersey.

Disciplinary proceedings against Mr. Abrams commenced initially within the jurisdiction of the state courts where ultimately the New Jersey Supreme Court, on the basis of the testimony adduced before and reports issued by its County Ethics Committee, entered an Order suspending him from the practice of law for one year (65 N.J. 172, 320 A. 2d 471, (1974)). Subsequent to this State Court determination, the Federal District Court, relying on the record compiled during the state court inquiry, initiated its own disciplinary proceeding by Order to Show Cause and after argument ordered that Mr. Abrams be permanently striken from its roll of attorneys. 43 U.S. L.W. 2270 (January 7, 1975)

We have been requested by the Honorable Collins J. Seitz, Chief Judge of the Third Circuit, to ascertain, as part of our presentation, the existence of any and all past instances in which a Federal District Court has deviated, whether by stringency or leniency, from the measure of discipline imposed previous to its action by the state's highest court.

Appendix A

Pursuant to such request, we would greatly appreciate any assistance your office could render with regard to the facts and circumstances surrounding each case where the District Court did not follow the state court determination in a disciplinary matter.

We recognize that your position as Clerk might not provide you with the information we seek to solicit. We would hope, however, that the Judges in your District, once apprised of our inquiry on behalf of the Third Circuit, would see fit to supply the information we desire to aid a coordinate federal court in its determination of this matter.

Respectfully yours,

CLIVE S. CUMMIS

CSC/cb

Appendix A

Schedule of Responses of U. S. District Courts to Disciplinary Practice, Annexed to Foregoing Affidavit

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Alabama, Northern	Feb. 3, 1975	"no recollection of this Court ever having disregarded the disciplinary action of the Supreme Court of Alabama"	Rule 7(a)(2)
Alabama, Middle	Feb. 4, 1975	no knowledge of any instances of deviation	None
Alabama, Southern	Feb. 12, 1975	"neither the Judges nor the undersigned (Clerk) can recall any other similar instance"	None
Alaska	Feb. 7, 1975	*Mackay* only proceeding which can be recalled of deviation	*In Re Mackay* 298 F. Supp. 170 (1969)
Arizona	Feb. 14, 1975	"no instances when the action taken by the U. S. District Court was more or less severe than the disciplinary action taken by the State Court"	None
Arkansas, Eastern	———	No response	———

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District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Arkansas, Western	Feb. 13, 1975	Substance of *Jones* opinion	*In Re Jones* 506 F. 2nd 527 (8th Cir. 1974)
California, Central	Undated	"our records do not indicate past instances where this Court has deviated from the action taken by the State Court"	None
California, Northern	Feb. 26, 1975	"in no instance has this Court deviated from the measure of discipline imposed by the Supreme Court of California"	None
California, Southern	Feb. 5, 1975	"no instances in which this Court has deviated from the measure of discipline imposed by this State's highest Court"	None
Colorado	Feb. 10, 1975	"in my thirteen years of association with this office I have not seen a case where this Court has deviated from the State Supreme Court disciplinary measures"	None

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Connecticut	Jan. 30, 1975	Rule requires attorney "shall be automatically disbarred or suspended for a like period from practice in this Court"	Rule 2(d)(2)
Delaware	Feb. 3, 1975	"knows of no case where the action taken by the Federal Court differed from that taken by the State Supreme Court"	None
District of Columbia	Feb. 3, 1975	"knows of no instance where this Court has imposed different discipline . . ."	None
Florida, Northern	————	No response	————
Florida, Middle	Jan. 31, 1975	knowledge of no instances of deviation in Clerk's 22 years of experience	None
Florida, Southern	Feb. 24, 1975	"never had occasion to deviate from the discipline imposed by action of our State Supreme in such matters"	None

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Georgia, Northern	Jan. 31, 1975	no records indicating deviation	None
Georgia, Middle	Feb. 14, 1975	"no instances where this Court failed to follow the State Court determination in a disciplinary matter"	None
Georgia, Southern	Feb. 11, 1975	"no instance in memory" where District Court disciplined "more stringently or more leniently than discipline imposed by the Supreme Court of Georgia"	None
Hawaii	Feb. 3, 1975	"not deviated from any recommendation or action of the Hawaii State Supreme Court"	None
Idaho	Feb. 14, 1975	"unable to find any instance in which this Court has deviated from the discipline imposed by the Idaho Supreme Court"	Rule 2(f)

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Illinois, Northern	————	No response	————
Illinois, Eastern	————	No response	————
Illinois, Southern	Feb. 13, 1975	no cases "in which the Federal Court did not follow the State Court determination pertaining to discipline of attorneys"	None
Indiana, Northern	————	No response	————
Indiana, Southern	————	No response	————
Iowa, Northern	Feb. 3, 1975	"practice (of State Supreme Court) to suspend attorneys indefinitely and allow them to apply for reinstatement after a given period of time. As near as we can tell from our records, this Court has followed a similar procedure"	None
Iowa, Southern	Feb. 13, 1975	"no instances in this District where our Court did not follow the state Court's determination in a disciplinary matter"	None

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Kansas	Feb. 11, 1975	"not appear that our Court deviates from the measure of discipline imposed by our State Supreme Court	Rule 4
Kentucky, Eastern	————	No response	————
Kentucky, Western	————	No response	————
Louisiana, Eastern	Feb. 10, 1975	Enclosed Local Rule 1(f)	Rule 1(f)
Louisiana, Middle	Undated	"A similar matter has never been before the Court"	None
Louisiana, Western	Feb. 4, 1975	no knowledge of any deviation for past 29 years since becoming Clerk	None
Maine	Feb. 14, 1975	"cannot recall any instances in which there has been such deviation"	None
Maryland	Feb. 11, 1975	deviation to extent that those who submitted a "resignation with prejudice" in State Court were disbarred by District Court	None

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Massachusetts	March 10, 1975	"not know of any instance where this Court has deviated from the measure of discipline imposed upon attorneys by the Supreme Court of Massachusetts"	None
Michigan, Eastern	————	No response	————
Michigan, Western	————	No response	————
Minnesota	Feb. 6, 1975	"our Court has followed State Court determinations in these matters"	None
Mississippi, Northern	Feb. 4, 1975	no record of any past instances of deviation	None
Mississippi, Southern	Feb. 3, 1975	"can find no record of the nature you requested"	None
Missouri, Eastern	Feb. 4, 1975	Disbarment subject to reinstatement which has never been refused by District Court once readmitted to State Courts	Rule II(d)

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Missouri, Western	————	No response	————
Montana	Feb. 13, 1975	strike name from rolls, following show cause hearing of attorneys disciplined by State Supreme Court. "The attorney is again reinstated upon notification that he has been reinstated by the Supreme Court of Montana"	None
Nebraska	Feb. 3, 1975	"not aware of any instance in this District when the Court deviated from the attorney disciplinary action pronounced by the Nebraska Supreme Court . . ."	None
Nevada	————	No response	————
New Hampshire	Feb. 4, 1975	"unaware of any case in which this Court deviated from disciplinary action taken by the New Hampshire Supreme Court"	Rule 4(e) *In Re Silverstein* 108 N. H. 400

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
New Mexico	Feb. 12, 1975	"cannot be of any assistance to you whatsoever in this regard . . ."	None
New York, Northern	————	No response	————
New York, Eastern	————	No response	————
New York, Southern	Feb. 6, 1975	Discussion of Rule that attorney disciplined by another Court "shall be disciplined to same extent" unless within 30 days of Order to Show Cause, attorney shows (1) deprivation of due process, (2) infirmity of proof, (3) grave injustice or (4) "that the misconduct established has been held by this Court to warrant substantially different discipline"	Rule 5(d)
New York, Western	Feb. 5, 1975	"policy adopted by Courts" is that upon notification of disbarment or suspension in State Court, attorney is "Stricken from the rolls of our Court"	None

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
North Carolina, Middle	Feb. 3, 1975	no cases "recalled by court personnel" of any deviation from measure of discipline imposed by the State	Rule 2(f)
North Carolina, Eastern	Feb. 18, 1975	no recall of any instance of deviation	None
North Carolina, Western	————	No response	————
North Dakota	Feb. 6, 1975	Court has on at least two separate occasions (Almo T. Christensen & Scott G. Anderson) ordered that attorneys suspended by State Court "be stricken for that period of suspension, subject to proper application for reinstatement to this Court"	Rule E & F
Ohio, Northern	————	No reponse	————
Ohio, Southern	Feb. 6, 1975	None who have been disbarred or permanently suspended by State Court have resisted disciplinary proceedings	None

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Oklahoma, Eastern	Feb. 10, 1975	"not been involved in a disciplinary action as outlined in your letter"	None
Oklahoma, Northern	————	No response	————
Oklahoma, Western	Feb. 3, 1975	"this District has always followed the State Supreme Court's ruling on disbarment proceedcedures for attorneys"	None
Oregon	Feb. 14, 1975	"customary procedure to seek voluntary resignation" from attorney suspended or disbarred by State Court. District Court has a "universal practice (which is) to withhold reinstatement until that attorney is reinstated to full privileges in the State Bar"	None
Pennsylvania, Middle	Feb. 3, 1975 Feb. 5, 1975	Discussion of *Dreir Case*	*In Re Drier* 258 F. 2nd 68 (3rd Cir., 1958)

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Pennsylvania, Western	———	No response	———
Pennsylvania, Eastern	Feb. 7, 1975	"has not deviated either by being more stringent or more lenient from disciplinary sanctions imposed upon a member of the bar of the Supreme Court of Pennsylvania"	None
Rhode Island	March 5, 1975	District Court "has relied upon the State record as well as upon the measure of discipline imposed by the State's highest Court"	None
South Carolina	———	No response	———
South Dakota	Feb. 5, 1975	Discussion of Rule; no discussion as to instances of deviation or practice	Section 7
Tennessee, Eastern	Feb. 13, 1975	"This Court has followed the State Court determination in all disciplinary matters"	None

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Tennessee, Middle	Feb. 7, 1975	no experience concerning disciplinary matters in which the District Court deviated from the measure of discipline imposed by the State's highest Court	None
Tennessee, Western	Feb. 10, 1975	"not aware of any case in point with your inquiry'"	None
Texas, Northern	———	No response	———
Texas, Eastern	Feb. 4, 1975	"it has been our experience" that the District Court "imposes the same disciplinary action that is ordered by the State Court"	None
Texas, Southern	Feb. 28, 1975	"we have invariably followed the penalties and recommendations imposed by the State Bar Grievance Committee proceedings"	None
Texas, Western	Feb. 12, 1975	Discussion of Rule	Rule 3

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Utah	Feb. 4, 1975	"We know of no situation where the Judges of the Court have deviated from the measure of discipline previously imposed by the State's highest Court"	None
Vermont	Feb. 4, 1975	No disciplinary action taken against any attorney during the past three years	None
Virginia, Eastern	Feb. 4, 1975	Discussion of Rule which reads in part, "If an attorney's membership in the State bar is suspended, his membership in the bar of this Court shall be suspended for the same period"	Rule 7(h)
Virginia, Western	Feb. 12, 1975	"we have had no disciplinary problems in this Court concerning any attorney authorized to practice in the Western District"	None

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Washington, Eastern	Feb. 14, 1975	District Court "has not, to the knowledge of anyone presently employed, had such an occasion arise"	None
Washington, Western	Feb. 5, 1975	"unable to find any instance in which the action of the Federal District Court deviated from that of the State Supreme Court in a disciplinary proceeding . . ."	None
West Virginia, Northern	Feb. 3, 1975	not "aware of any instance in which this Court has deviated from application of the measure of discipline imposed upon attorney by the West Virginia Supreme Court of Appeals"	None
West Virginia, Southern	Jan. 31, 1975	In no instance "had this Court ever deviated from the action of the State Supreme Court in matters of discipline"	None

Appendix A

District Courts	*Date of Response*	*Substance of Response*	*Cited Rule or Case*
Wisconsin, Eastern	Jan. 31, 1975	"find no instance in which this District Court did not follow the determination of the Wisconsin Supreme Court in disbarment or suspension proceedings"	None
Wisconsin, Western	Feb. 3, 1975	not "recall any instance in this District in which this Court imposed a different measure of discipline upon an attorney than that previously imposed by the Wisconsin Supreme Court"	None
Wyoming	Feb. 3, 1975	"no discipline has been meted out to an attorney which has differed in any respect from the State Court determination"	None

APPENDIX B

Order of Mountain, P.J.S.C., dated July 10, 1975

SUPREME COURT OF NEW JERSEY

D-67 September Term 1974

In the Matter of

ARTHUR LAWRENCE ABRAMS

An Attorney at Law

This matter having been duly presented to the Court, it is ORDERED that the suspension of Arthur Lawrence Abrams of Newark be lifted, and he is restored to the practice of law, effective immediately.

WITNESS, the Honorable Worrall F. Mountain, Presiding Justice, at Trenton, this 10th day of July, 1975.

Filed
July 10, 1975

FLORENCE R. PESHOE
Clerk

FLORENCE R. PESHOE
Clerk

A True Copy.

FLORENCE R. PESHOE
Clerk

OCT 28 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-487

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY,

Petitioner,

v.

ARTHUR LAWRENCE ABRAMS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

NEW JERSEY STATE BAR ASSOCIATION, *AMICUS CURIAE'S* BRIEF IN OPPOSITION

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Attorney for New Jersey State Bar Association, Amicus Curiae.

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On the brief:

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NEW JERSEY STATE BAR ASSOCIATION, *AMICUS CURIAE'S* BRIEF IN OPPOSITION

Preliminary Statement

The New Jersey State Bar Association herein presents its brief as *amicus curiae,* in accordance with United States Supreme Court Rule 42(1), prior to the considera-

tion by this Court of the petition for certiorari, heretofore filed by the petitioner.

The consent of the parties has been obtained pursuant to Rule 42 (1), and letters of consent have been filed with the Clerk of the Supreme Court.

Counter-Statement of Questions

When an attorney has been disciplined by a state court for professional misconduct on the basis of a presentment of the county Ethics Committee, and a United States District Court thereafter seeks to discipline that attorney on the basis of the same record:

(a) may the court of appeals, on review, reverse the district court for procedural errors resulting in a denial of due process, and

(b) may the court of appeals, on review, reverse the district court for incorrect precedential reliance?

Interest of the New Jersey State Bar Association

This is the first recorded instance where the District Court in New Jersey has meted out a more severe disciplinary sanction to an attorney than the State Supreme Court on the identical record used by the state court. Obviously, such a result has important ramifications not only for the members of the Association but for the entire bar as well. In order to insure that in such cases the appropriate procedural process is followed by the District Court, the Association continues to participate.

Statement

In 1973, the Essex County Ethics Committee charged the respondent, Arthur Lawrence Abrams, with various ethical violations stemming from his activities for Port Jersey Corporation. In reviewing those charges, the New Jersey Supreme Court concerned itself only with Abrams' participation in a $20,000 payment to Jersey City officials. The presentment of the county Ethics Committee originally contained a finding that the sharing of a real estate commission by Abrams violated New Jersey law, but this charge was later withdrawn by the Committee and was not considered by the New Jersey Supreme Court. In an opinion rendered on June 4, 1974, the Supreme Court of New Jersey suspended the respondent from the practice of law for one year. 65 N. J. 172 (1974).

Thereafter, the Federal District Court for the District of New Jersey instituted disciplinary proceedings against the respondent pursuant to Local Rule 7. Generally the disciplinary proceeding of the Federal Court required by Local Rule 7 relies heavily on extensive hearings conducted by the various state investigatory bodies, County Ethics Committees, and the opinions of the Supreme Court of New Jersey. In this case, the Federal District Court and the State Supreme Court both relied on the record developed by the Essex County Ethics Committee. The majority of a divided district court, considering the charge presented to the Supreme Court, as well as charges either withdrawn or never considered by the county Ethics Committee, concluded that the respondent should be disbarred rather than suspended and entered an order to that effect. 385 F. Supp. 1210 (D. N. J. 1974).

On June 30, 1975, the United States Court of Appeals for the Third Circuit reversed the decision of the district

court. Four separate opinions were filed. The thread common to all was the conclusion that the district court failed to follow its own rules in the conduct of the proceeding. *In re Abrams,* No. 75-1029 (3rd Cir., filed June 30, 1975).

ARGUMENT

The petitioner initially contends that the court of appeals concluded "that it was impermissible for the district court to disagree with a state court determination as to the discipline to be imposed upon an attorney who was clearly proven to have been guilty of serious misconduct. . . ." (Petition for Writ of *Certiorari,* 20). This was simply not the holding. At no time did the court of appeals question the power of the district court to impose a different quantum of discipline than the state court, or make a different legal analysis than the state court. On the contrary, the court of appeals expressly recognized such rights in its opinion,* but reversed the holding of the district court because of serious procedural deficiencies which will hereafter be discussed.

Petitioner next argues that the court of appeals' decision concerning the applicability of state law was incon-

*"We acknowledge the right of the district court 'to discharge [an] independent obligation' and to 'take appropriate action on its own rational analysis and determination.' We further acknowledge that the 'appropriate action' may be at variance with that taken by the state court system. We also acknowledge that the district court may draw inferences from 'facts and circumstances' which differ from those drawn by the state. Especially do we believe that the district court may emphasize countervailing federal considerations. [citations omitted] But 'appropriate action' must always embody a proper application of governing legal precepts. We conclude that the district court's action was deficient in this respect." (Appendix A, Petition for Writ of *Certiorari,* 20a).

sistent with prior precedent. That court did not hold, as the petitioner asserts (Petition for Writ of *Certiorari,* 25), that the district court was bound by state law. On this subject, the court of appeals said:

> In the context of its announced objective to 'hold the greatest respect for, and give due weight and consideration to, the views of the [New Jersey] Supreme Court,' the district court was not free to rely upon *Colsey* for New Jersey precedential guidance. Having elected to bottom its own rational analysis on New Jersey law, the controlling case for the district court was *In re Abrams*—not *In re Colsey.* And, in *Abrams,* the New Jersey Supreme Court explicitly concluded that *Colsey* was distinguishable. . . . Whatever freedom the district court possessed independently to draw inferences from the facts and circumstances, the court could not, with fealty to consistency, disregard the interpretation of New Jersey state law by that state's highest court and at the same time profess to 'hold the greatest respect for, and give due weight and consideration to, the views of the [New Jersey] Supreme Court,' (Appendix A, Petition for Writ of *Certiorari,* 21a).

Thus the error which the court of appeals was correcting did not involve choice of law but consistent application of the law once chosen. The court of appeals clearly has the power to reverse the district court for an erroneous interpretation and application of the law. The court of appeals concluded that the district court had applied a faulty legal analysis by purporting to rely on state law while ignoring the controlling case, namely, *In re Abrams.* In so doing, the court of appeals was properly exercising its jurisdiction.

Petitioner also argues that the decision by the court of appeals has expanded the scope of review in discip-

linary matters. This expansion is said to have occurred because the court of appeals reviewed the procedures followed by the district court in addition to the result achieved. Relying on *Ex Parte Burr*, 22 U. S. (9 Wheat) 529 (1824), petitioner contends that the scope of appellate review in disciplinary proceedings is confined to the "narrow limits of clear abuse of discretion."* That argument must be premised on the mistaken notion that misapplication of a court rule can never be an abuse of discretion.

Local Rule 7(2)(b) of the New Jersey District Court provides for disciplinary proceedings of one who has been disbarred or suspended from practice in any state. Insofar as the district court based its authority on Rule 7(2)(b), the matters considered should have been restricted to those considered by the state court, because the Rule 7(2)(b) proceeding is derivative in nature.** In-

---

* Petitioner's reliance on *Burr* is misplaced, for this Court there recognized a reviewing court's right to interpose for irregularities in the "mode of proceeding" by the disciplinary court. See *Ex Parte Burr*, supra at 531.

** Although choosing not to invoke it, the district court also had available Rule 7(2)(d). That rule provides for disciplinary action of one who is "guilty of conduct unbecoming a member of the bar of this court." Such proceedings are governed by Rule 7(4), which provides:

> [P]roceedings relating to 'conduct unbecoming a member of the bar of this court' 'shall be presented to the chief judge, and, if he deems the charges of professional misconduct of sufficient weight, he shall refer them for preliminary investigation and recommendation to a committee of members of the bar of the court designated by him or to the United States Attorney.'

The district court chose not to follow this procedure, thereby precluding reliance on Rule 7(2)(d).

stead, the district court considered two charges which were not before the state court, to wit, the alleged sharing of a brokerage commission and acquisition of an interest in Abrams' client's business. In so doing, the district court violated the rule early stated by this Court that

> [B]efore a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This is a rule of natural justice and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. *Ex parte Robinson*, 86 U. S. (19 Wall) 505, 512 (1873).

Since then, this Court has consistently held that a lawyer in a disciplinary proceeding is entitled to procedural due process, including fair notice of the charges. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1957); *In re Ruffalo*, 390 U. S. 544, 550 (1968).

Petitioner seeks to create an alleged conflict between the Third Circuit and the District of Columbia Circuit by contrasting *In re Abrams* with *In the Matter of Richard G. Kleindienst*, No. S-37-75 (D. C Cir., filed August 11, 1975). These two cases, however, are inopposite. The sole issue before the Third Circuit was whether reversible error had been committed by the lower court. In *Kleindienst*, there was no question of the failure of a lower court to follow its own rules or correctly apply state law. Moreover, the primary question in the *Kleindienst* case, the right to practice before the court of appeals, was explicitly stated *not* to be at issue in *Abrams*:

> [P]reliminarily we emphasize that which is before us and that which is not. We are not to decide

> Abrams' right to practice in this court. (Appendix A, Petition for Writ of *Certiorari,* 11a).

Because the Third Circuit recognized that in certain circumstances different quantums of discipline might be imposed by different courts, there is no possible conflict.

In summary, despite petitioner's repeated attempts to characterize the opinion otherwise, the court of appeals simply acted to reverse the district court because of its failure to act within recognized procedural and legal standards. Such a decision causes no conflict within the circuit courts, does not conflict with state law, and clearly does not present any federal question. In such a circumstance, petitioner has failed to show any reason for granting *certiorari.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

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Respondent.

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AMICUS CURIAE BRIEF OF FEDERAL BAR ASSOCIATION (NEWARK CHAPTER)

Interest of The *Amicus Curiae*

The Federal Bar Association (Newark Chapter) was invited by the Court of Appeals to submit an amicus brief while this case was pending there. It did so. It now has the consent of the petitioner and respondent to file this brief in the Supreme Court.

The issues presented here are substantial. The rule announced by the Court of Appeals appears to be the first such judicial expression and has far-reaching effects on the powers of the District Court to control who shall be permitted to practice before it. This case has generated six opinions: the majority and dissenting opinions in the District Court's seven-to-two decision; the four opinions in the Third Circuit. The issue calls for review and decision by this Court so that all District Courts may know whether *de facto* control over disbarment proceedings before them really rests with the State Courts.

ARGUMENT

POINT I

The District Court had the power to disbar the respondent, notwithstanding the lighter sanction of suspension which he received at the hands of the New Jersey Supreme Court.

A. Power to Disbar

Article III, Section 1, of the Constitution provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The judicial power includes the power to admit or exclude attorneys to or from practice before the court. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-9 (1866). It is a power which rests exclusively with the court. *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856).

In addition to the Constitution, there exist an Act of Congress and a provision of the Federal Rules of Civil Procedure which permit the District Courts to prescribe requirements for admission to practice before them. *Sanders* v. *Russell*, 401 F.2d 241, 245 (5th Cir. 1968); *In Re Crow*, 283 F.2d 685, 686 (6th Cir. 1960). The statute is 28 U.S.C. 2071 which states:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

The relevant Federal Rule is F.R.Civ.P. 83, 28 U.S.C. which states:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

There is no uniform procedure for suspension and disbarment proceedings in the District Courts. The matter is left to the individual Districts. *In Re Echeles*, 430 F.2d 347, 350 (7th Cir. 1970). While the Local Rules vary in detail between and among the five Districts of the Third Circuit, all provide for discipline or disbarment after notice and an opportunity to be heard. In that respect

they are no different from similar rules governing practice in this Court, U.S. Sup. Ct. Rules 5 and 8, 28 U.S.C., and in the Courts of Appeals, F.R.A.P. 46, 28 U.S.C.

B. Separate Sovereigns

The ultimate judicial expression on the separate sovereignty issue is found in *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat. 415, 424 (1819)):

> "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

That concept, as applied to the judicial control of attorneys, finds expression in *Theard* v. *United States,* 354 U.S. 278, 281 (1957), where Justice Frankfurter wrote:

> "The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included."

If for no other reason than that persons of good will often draw different conclusions from the same facts, it is inevitable that State and Federal Courts occasionally differ on the punishment to be inflicted on an attorney for a given offense. The reported cases on the point are rare but they do exist. That the act of the judiciary of one sovereign cannot bind the judiciary of the other follows inevitably from *McCulloch.* If the State is the first to take action against any attorney, that action "is entitled to respect, [but] it is not conclusively binding on the federal courts." *Re Ruffalo,* 390 U.S. 544, 547 (1968).

C. The Limiting Rule Adopted By the Court of Appeals

The Third Circuit held that the District Court's power to discipline attorneys "may be circumscribed to the extent the district court, in imposing its disciplinary sanctions, relies upon a state's legal or factual determinations. Stated otherwise, the district courts' action may be circumscribed to the extent it depends in whole or in part on a state's actions, either for the commencement of the disciplinary proceedings or for a stated basis in the determination of the sanction imposed".

This novel, limiting rule does violence to established principles of federalism. It should not be permitted to stand. Unless reversed, the State Courts could exercise effective control over all Federal Court disciplinary matters, including those in this Court.[1] Moreover, it seems clear that the District Court did not rely on the State's legal or factual determinations but came to its own independent conclusions from exactly the same record which was before the New Jersey Supreme Court.

The fact is that the New Jersey Supreme Court was not engaged in "fact finding" as that term is commonly accepted. Nor did the District Court rely on "facts" found by any other body. It found the facts itself and in the context of its own hearing.

The Supreme Court "found" nothing. It did not conduct an evidentiary hearing. The Supreme Court re-

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[1] The logical extension of the Court of Appeals rule is that this Court cannot impose a longer period of suspension on a member of the bar of this Court than was imposed by him in a State proceeding, absent a plenary hearing here. Yet this Court has regularly permanently disbarred attorneys from this Court when the States have imposed relatively short periods of suspension.

viewed the record developed before the Essex County Ethics Committee and that Committee's factual determinations. It then decided that the Committee's factual determinations were correct and imposed a sanction on Abrams which it felt was appropriate.

In its disciplinary action the District Court obtained the identical Ethics Committee record which was before the Supreme Court. The District Court offered Abrams the opportunity to submit additional facts if he so desired. He chose *not* to do so, his counsel stating: "We are prepared to submit on the record". Tr. p. 27, June 24, 1974.

Additionally, Abrams had argued in his brief to the Supreme Court that he had not known that the $20,000 payment was being made to Flaherty, the public official. The Supreme Court concluded otherwise. At the subsequent District Court proceeding Abrams' counsel acknowledged that his client had known the money was being paid to Flaherty.

In short, not only did the District Court *not* rely on facts found by the Supreme Court, it made an independent factual analysis based in part by a concession of fact by Abrams to it, where there had been a previous denial to the State Court. The facts surrounding Abrams' conduct are not in dispute; the only issue is the appropriate sanction warranted by the facts.[2] Two responsible Courts,

[2] It is difficult to see how the Court of Appeals, under any traditional scope of review approach, could bar the District Court from considering the "commission aspect" of the State record. The District Court had the State record before it. The conclusion reached by the District Court was one which fairly could be reached from that record. Abrams chose not to supplement the record and his

(Footnote continued on following page)

independently reviewing the same record, concluded that different sanctions were appropriate. Stripped to the bones, that is all there really is to the differences between the State and Federal proceedings.

The fact that the District Court referred to the *Colsey* case reflects nothing more than the observation that New Jersey had disbarred that attorney for conduct similar to that of Abrams. It was not cited for purposes of *stare decisis*. Indeed, it reflected nothing more than the District Court's conclusion that the Supreme Court had permitted disparity in treatment between the two lawyers. The District Court was not required to impose the same sanction the State had given Colsey. It chose to do so. It was not required to impose the less severe sanction given to Abrams. It chose not to do so for the reason that Abrams' conduct, in its opinion, was like Colsey's.

This issue also seems to have been considered in *Hancock* v. *Andrews*, 161 F.2d 547 (5th Cir. 1947). The attorney was given a reprimand by a Georgia State Court and thereafter penalized with a six-month suspension by the District Court. On appeal it was urged that the State reprimand "should have been accepted by the Federal Court as conclusive". This argument was not accepted, the Court of Appeals holding that "disciplinary action

(Footnote continued from preceding page)

counsel acknowledged that the District Court had the power ". . . to discipline as it appears to the court the discipline should be . . ." As the Third Circuit itself has held, an attorney who has been disciplined in the State Court is not entitled to a trial *de novo* in the District Court when disciplinary action thereafter is undertaken against him. The attorney who has "the duty of coming forward with evidence to rebut the state court record". *Petition of the Committee of Censors of the Philadelphia Bar Association*, 307 F.2d 880 (3d Cir. 1964), cert. den., 371 U.S. 923 (1962).

taken by the State Courts against an attorney for unprofessional conduct in a case pending in the Federal Court does not preclude the Federal Court also from taking action in such a matter". 161 F.2d at 548.

The final point is this: the danger in the Court of Appeals opinion is that it appears to command District Courts to follow blindly the conclusions reached by the State Courts when the facts before them are the same and the only issue is the appropriate penalty. Each Court must decide the penalty question itself, as it sees the right and the wrong and as it implements its own concepts of propriety for the members of its bar. In the last analysis each Court must bear the ultimate responsibility for the lawyers it permits to practice within its own precints.

The decision of the Court of Appeals is in derogation of principles of federalism and should be overturned. This Court should announce what the correct standard is: each Court must be the master of its own house.

POINT II

Scope of Review

Since the District Court had the power to disbar Abrams, a primary issue on appeal has to be what is the appropriate scope of review the Court of Appeals should have employed. The cases establish that a reversal could only have been entered if that Court concluded that the seven District Court Judges abused their discretion in deciding to disbar the attorney. See *Hancock* v. *Andrews, supra,* which holds that the District Court has "wide discretion" in entering an Order in a disciplinary case and that it has to be shown that "such discretion was abused". 161 F. 2d at 549.

Perhaps the best reasoned "scope of review" decision is one written by Chief Justice Marshall. In *Ex parte Burr*, 22 U. S. (9 Wheat.) 168 (1824), an attorney sought a motion to mandamus the lower Federal Court to restore him to practice. He had been suspended for one year. The Supreme Court opinion holds:

> "On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, the same means of information as the court itself. *If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.*
>
> "Some doubts are felt in this court respecting the extent of its authority as to the conduct of the circuit and district courts towards their officers; but without deciding on this question, *the court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper.*" (Emphasis supplied)

The issue on appeal may be stated in these terms: In a case where all the Federal Judges who voted on the

case concluded that the attorney's conduct was unethical and merited suspension from practice, did seven of the nine District Judges abuse their discretion by imposing a more severe penalty than the two dissenting Judges would have imposed? Is this the "plain case" of which *Burr* speaks where the action below was flagrantly improper"?

Lastly, since the District Court concluded from its "independent determination" that disbarment was the correct remedy, would not the majority below have acted improperly if they had elected to follow the State decision? If two reasonable persons can differ on a matter, and each has an independent duty to act on the matter, how is the integrity of the judicial process maintained if one of the two fails to function?

CONCLUSION

For the reasons set forth herein it is respectfully submitted that the petition for a writ of certiorari should be granted, that the decision of the Court of Appeals should be reversed and that the Order of the District Court should be reinstated.

Respectfully submitted,

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